No. 85-1957

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

DANIEL A. BRUNO and PHILIP R. HERZIG,

Petitioners,

v.

WESTERN PACIFIC RAILROAD COMPANY and UNION PACIFIC CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

RONALD LITOWITZ
(Counsel of Record)
DANIEL L. BERGER
BERNSTEIN LITOWITZ BERGER
& GROSSMANN
875 Third Avenue
New York, New York 10022
(212) 751-6100

Counsel For Petitioners

85-1957

Questions Presented

1. Whether 49 U.S.C. § 11341(a) allows a common carrier participating in a consolidation approved by the Interstate Commerce Commission ("ICC") pursuant to 49 U.S.C. §§ 11343 and 11344, an automatic exemption from state statutes governing rights of shareholders, absent an ICC finding that such exemption is necessary for the carrier to effectuate the consolidation?

2. Whether a common carrier participating in an ICC-approved consolidation, may, by express conduct, waive an exemption from state law provided by 49 U.S.C. § 11341(a) to which it may be entitled?

Parties

The parties to the proceeding below are listed in the caption. Because the Delaware Supreme Court held that the Interstate Commerce Act preempts the Delaware appraisal statute (Del. Code Ann. tit. 8, § 262) in the circumstances of this case, 28 U.S.C. § 2403(b) may be applicable and this petition for a writ of certiorari has been served upon the Attorney General of the State of Delaware.

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October Term, 1985

DANIEL A. BRUNO and PHILIP R. HERZIG,

Petitioners,

v.

WESTERN PACIFIC RAILROAD COMPANY and
UNION PACIFIC CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

Daniel A. Bruno and Philip R. Herzig petition for a writ of certiorari to review an Opinion and Order of the Supreme Court of the State of Delaware. This Order affirmed a decision by the Delaware Court of Chancery that dismissed an appraisal proceeding brought by petitioners seeking "fair value" for their shares pursuant to Del. Code Ann. tit. 8, § 262 (the "appraisal statute") after a statutory merger. The appraisal proceeding was dismissed for lack

of jurisdiction, on grounds that the Delaware appraisal statute is preempted by the Interstate Commerce Act, 49 U.S.C. § 11341(a).

Opinions Below

The Opinion and Order of the Supreme Court of Delaware is unpublished and is set forth as Appendix A at A1-A4. The Opinion of the Chancery Court is reported at 498 A.2d 171 (Del. Ch. 1985) and is set forth as Appendix B at A5-A14. The Order of the Chancery Court is unpublished and is set forth as Appendix C at A15.

Jurisdiction

The Order of the Supreme Court of Delaware was rendered on March 7, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Statutes Involved

The statutes involved in this proceeding are the Interstate Commerce Act, 49 U.S.C. § 11341 and the Delaware appraisal statute, Del. Code Ann. tit. 8, § 262. These statutes are set forth as Appendices G and H at A38 and A39-A46, respectively.

Statement of the Case

This case involves the interplay between the Interstate Commerce Commission's ("ICC") authority to approve mergers involving interstate common carriers and state

statutes protecting the rights of stockholders of public corporations which merge after ICC approval. The case arises from the attempt by over one hundred stockholders of Western Pacific Railroad Company ("WesPac") to assert their Delaware statutory appraisal rights after a merger between WesPac and Union Pacific Corporation ("Union Pacific") that was approved by the ICC. The Delaware courts dismissed the appraisal action, holding that the Interstate Commerce Act preempts the appraisal statute (A2, A14).

The language of 49 U.S.C. § 11341(a) and recent Court of Appeals decisions demonstrate that state laws touching ICC-approved mergers are not superseded unless first, abrogation of those laws is necessary to effectuate the consolidation and, second, the ICC makes an express finding to that effect. Neither condition occurred in the Union Pacific-WesPac merger. Indeed, these railroads expressly waived any exemption from Delaware law that they might have had under § 11341(a).

However, despite the court-acknowledged equities in favor of petitioners, the trial court and the Supreme Court of Delaware believed their hands were tied by the Court's decision in *Schwabacher v. United States*, 334 U.S. 182 (1948) ("*Schwabacher*"). They ruled that the Delaware legislative grant of appraisal rights to cashed-out minority stockholders was preempted. This decision fundamentally misapplied the Court's *Schwabacher* decision, conflicts with recent decisions of the District of Columbia and Fifth Circuit Courts of Appeals and overrides longstanding state regulatory authority over shareholders rights.

Furthermore, respondents engaged in a course of conduct in ICC proceedings and before federal courts, includ-

ing this Court, that totally abused the administrative and judicial process by misusing this Court's *Schwabacher* decision.

Background Facts

On January 23, 1980, Union Pacific made a friendly, unopposed tender offer to acquire all of the Class A common stock of WesPac, a Delaware Corporation, at $20 per share. The day before, WesPac and Union Pacific had entered into a merger agreement to merge WesPac into a wholly-owned subsidiary of Union Pacific at the same $20 per share for all shares remaining after the tender offer. After the tender, Union Pacific owned 86.9% of the WesPac Class A common stock; WesPac stockholders owning 13.1% of the Class A shares chose not to tender.

Under Delaware law, Del. Code Ann. tit. 8, § 262, stockholders have the right to dissent from a merger and demand appraisal of their shares. In such a proceeding, the Delaware Chancery Court adjudicates the "fair value" of the shares as of the date of the merger and considers many factors other than market price, including the merged company's asset value, earning capacity and the synergistic benefits of merging the two companies. *See Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983).

In the tender offer solicitation to WesPac shareholders, Union Pacific recognized that given the ICC's authority to exempt approved consolidations from certain state laws, 49 U.S.C. § 11341(a), there could be some question whether Delaware appraisal rights would survive the consolidation. However, Union Pacific then informed shareholders that

as part of the merger terms, it decided that an exemption from the appraisal statute was not necessary to effectuate the merger and agreed not to object to an appraisal proceeding going forward. The tender offer document stated:

> In the opinion of counsel for the Purchaser [Union Pacific], dissenting stockholders may not have any appraisal rights in view of the provisions of Sections 11344 and 11346 of the Interstate Commerce Act. In *Schwabacher v. United States,* 334 U.S. 182 (1948), the Supreme Court of the United States, in construing the predecessors to those Sections of the Interstate Commerce Act, held that appraisal rights granted by state law do not survive a merger agreement approved by the ICC as just and reasonable, such rights being, as a matter of Federal law, accorded recognition in the ICC's obligation not to approve any merger which is not just and reasonable. *However, the Purchaser [Union Pacific] has agreed that in the event the Merger is consummated, it will not object if, holders of Shares not owned by the Purchaser seek the right to dissent and demand appraisal of their Shares under Delaware law. . . . The Purchaser will pay any appraised value so determined.*

January 23, 1980 tender offer document, p. 9, (*emphasis supplied*).

After the tender offer, Union Pacific (which owned and operated the Union Pacific Railroad Company), applied for ICC approval, pursuant to the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.,* to acquire and exercise control over WesPac and its railroad carrier operations. *See In re Union Pacific-Control-Missouri Pacific; Western Pacific,* 366 I.C.C. 459, 471 (1982), *aff'd sub nom. Southern Pacific Transportation Co. v. ICC,* 736 F.2d 708 (D.C. Cir. 1984),

cert. denied sub nom. Kansas City Southern Railway Co. v. United States, 105 S. Ct. 1171 (1985).

The ICC held hearings on the proposed consolidation and, on September 24, 1982, approved the consolidation of WesPac into Union Pacific. 366 I.C.C. 459. Exercising its responsibility to determine that the merger was fair and reasonable, the ICC decided that the $20 per share provided the WesPac minority shareholders was in the range of reasonableness. 366 I.C.C. at 636. Union Pacific's agreement to afford dissenting shareholders Delaware statutory appraisal rights was before the ICC and constituted part of the merger terms adjudicated "fair and reasonable" to WesPac's stockholders.

The ICC also considered whether to exempt the Union Pacific-WesPac approved consolidation from application of "other laws," as it has the authority to do pursuant to 49 U.S.C. § 11341(a). In one instance it did so and ruled that exemption from the Pacific Railroad Acts, 45 U.S.C. § 83, was necessary to effectuate the consolidation and awarded the merger participants an exemption from application of that law. 366 I.C.C. at 548-549, 561-562. The ICC made no finding and did not immunize the Union Pacific-WesPac merger from the Delaware appraisal statute —undoubtedly because Union Pacific had represented that it did not need such an exemption and had publicly stated that it was providing WesPac shareholders the right to a Delaware appraisal.

On appeal to the United States Court of Appeals for the District of Columbia Circuit, the ICC's decision was affirmed. *Southern Pacific Transportation Co. v. ICC*, 736

F.2d 708 (D.C. Cir. 1984). Here, Union Pacific specifically represented to the District of Columbia Circuit that it had agreed to allow Delaware appraisal and to forego any exemption under § 11341(a). In its brief, Union Pacific contended that, as a matter of law, its agreement eliminated any obstacle *Schwabacher* could pose to appraisal:

> The tender offer, circulated in January 1980, contained a provision that, in the event of consummation of the UP-WP transaction, Union Pacific would not object if WPRR shareholders dissatisfied with the $20 price were to dissent and demand appraisal of their shares under Delaware law. *The WPRR shareholders would not have been entitled to demand appraisal rights absent UPC's agreement. See Schwabacher v. United States,* 334 U.S. 182, 201 (1948).

Brief for Intervenor-Respondents Union Pacific, *et al.* at p. 70, *Southern Pacific Transportation Co. v. ICC,* 736 F.2d 708 (D.C. Cir. 1984) (*emphasis supplied*).

At oral argument, Union Pacific's attorney, Charles Miller, told the D.C. Circuit that because Union Pacific made a "contract" with shareholders not to object to appraisal and to pay whatever the Delaware Chancery Court awarded as fair, the *Schwabacher* doctrine did not deprive the Chancery Court of jurisdiction:

> Mr. Miller: There were a number of stockholders, including Mr. Wheeler, who is the party before the Court today, who dissented from the sale and have claimed the right to appraisal of the value of their stock under Delaware law, *a right which the Union Pacific has allowed the shareholders to assert although it need not have done so.* At this point the stockholders are no longer stockholders of Western Pacific.

The Court: Need not have done so, that appraisal right wasn't determined by the Commission, was it?

Miller: No, *it was determined by contract by Union Pacific, because but for the contract there would have been a* Schwabacher *doctrine which would have said no state law. We did that by contract when we made the deal.*

But these dissenting stockholders are no longer stockholders. They are now creditors of the company in an amount to be determined by the Delaware Court. In these circumstances, I would like to suggest that there is no real purpose to be served by any further ICC role in this particular transaction. These minority stockholders are not seeking to overturn the mergers. They are simply seeking to get a higher price for their stock. *A forum exists in Delaware to resolve that question and that is going to go forward, whatever happens at the ICC or in this appeal.*

The Court: At least it is the intention of the company, it is not the intention of the company to assert in the Delaware court the defense of the appraisal right, this is a matter that has been determined by the ICC at a value of $20?

Mr. Miller: Not in the way you have said it, Your Honor, although if there is an appraisal case I am sure we will cite to the ICC and rely upon it, but we have had . . .

The Court: It is probably a little bit of a Catch 22 situation?

Mr. Miller: Oh, no, there is a difference. There is an awfully big difference. The fact that the ICC was right is not a reason not to show it to the Court in Delaware. But we have not asserted a *Schwabacher* defense to the case, and if the Delaware court disagrees, it disagrees.

The Delaware court can decide that the price is $20 or higher or lower. Whatever they decide will be the

> *amount that is paid to the minority stockholders.* All I am suggesting here is there isn't much reason at this point in transportation regulation for this issue to be concerning the ICC.

Record at 3-4, *Southern Pacific Transportation Co.* v. *ICC*, Appendix F at A36-A37 (*emphasis supplied*).

Union Pacific made these arguments to rebut the suggestion by WesPac stockholders that although Union Pacific agreed not to object to appraisal at the ICC stage, Union Pacific might later use *Schwabacher* to deprive them of their appraisal rights. Union Pacific confidently assured the District of Columbia Circuit that WesPac stockholders need not fear this "Catch 22" (A37).

Union Pacific then informed this Court that the Interstate Commerce Act had no effect on the Delaware appraisal statute. In a petition for certiorari to review the D.C. Circuit's affirmance of ICC approval of the Union Pacific-WesPac consolidation, a WesPac stockholder argued that the ICC incorrectly determined that the consideration given WesPac minority shareholders was fair and reasonable. In response, Union Pacific told this Court that even if this were so, Union Pacific's agreement not to object to Delaware appraisal insured a judicial forum to address minority shareholders' claims for just compensation:

> The underlying issue presented by Wheeler is now pending before the Chancery Court in Delaware, where dissenting WesPac shareholders have sought appraisal rights afforded by Delaware law. Union Pacific agreed at the time of the transaction not to object to dissenting shareholders' pursuing whatever appraisal remedies they might have under state law. *See Schwabacher v.*

> *United States*, 334 U.S. 182, 201 (1948). Therefore, even if the ICC, the Court of Appeals, Western Pacific's management and Salomon Brothers all erred in concluding that the price was fair, *dissenting shareholders who pursue their remedies in Delaware presumably would not be "deprive[d] . . . of just and reasonable compensation for [their] property," as Wheeler alleges.*

Brief of Respondents Union Pacific, *et al.*, In Opposition to Petitions for a Writ of Certiorari at p. 12, *Kansas City Southern Railway Co. v. United States*, 105 S. Ct. 1171 (1985) (*emphasis supplied*).

While judicial approval of the ICC decision was pending, WesPac and Union Pacific proceeded to consumate their merger. WesPac, now controlled by Union Pacific, sent its shareholders a proxy statement, dated May 2, 1983, in connection with a stockholders meeting called to approve the merger. In this proxy statement, WesPac again informed shareholders of their right to seek appraisal under Delaware law, of the procedural requisites for perfecting appraisal and of the considerations the Delaware Chancery Court would apply in determining the fair value of WesPac Class A common stock. Respondents never suggested that they had sought or were entitled to an exemption by virtue of § 11341(a) from the Delaware appraisal statute. To the contrary, shareholders again were specifically told in the May 2, 1983 proxy statement that Union Pacific would not use *Schwabacher* to defeat shareholders' appraisal rights:

> In *Schwabacher v. United States*, 334 U.S. 182 (1948), the United States Supreme Court, in construing the predecessors to Sections 11344 and 11346 of the Interstate Commerce Act, held that appraisal rights

> otherwise granted by state law are preempted in the case of acquisitions approved as just and reasonable by the ICC in accordance with applicable Federal law. *Nevertheless, Union Pacific has agreed that it will not object if holders of Class A Common Stock not owned by Union Pacific or its affiliates demand appraisal of their Class A Common Stock under Delaware law.*

May 2, 1983 proxy statement, p. 5 (*emphasis supplied*).

With Union Pacific voting its 87% WesPac ownership in favor, the merger was a foregone conclusion and was approved on May 24, 1983. Petitioners and more than 100 other shareholders residing throughout the United States, owning 147,110 Class A shares—fully 80% of the shares eligible to seek appraisal—elected to exercise their appraisal rights. The extraordinary number of persons who sought appraisal is remarkable because many of these shareholders, including petitioner Bruno, had already waited over three years since rejecting Union Pacific's $20 tender offer. These minority shareholders plainly relied on respondents' repeated assurances in the tender and merger documents and on respondents' representations to federal courts that they would not object to appraisal. Accordingly, the minority stockholders were prepared to wait yet longer to receive fair value for their WesPac stock.

The overwhelming choice to seek appraisal is also explained by the disclosures WesPac made in its May 1983 proxy statement. Here, for the first time, respondents revealed that WesPac had extensive holdings of industrial real estate, not used in railroad operations, that were extremely valuable. This land, recorded on WesPac's books at historical cost, had been sold or was held for sale. In

the text of the proxy statement, WesPac estimated that this non-railroad property would yield Union Pacific nearly $80 per share! Union Pacific had not disclosed the actual value of this non-railroad, saleable land to the ICC, which decided that the $20 merger price was fair and reasonable. The ICC, of course, was ignorant of this $80 per share windfall Union Pacific would obtain by the merger.

When it approved the $20 merger price as fair to WesPac minority stockholders, the ICC stated: "Equity or book value is of significance only in the event of the railroad's liquidation or nationalization. Moreover, land values are of little or no significance in determining the value of stock." 366 I.C.C. at 636. Undoubtedly, the ICC assumed all WesPac land was used in railroad operations and was unaware that WesPac had non-railroad land it was selling off. In a Delaware appraisal, the Chancery Court would have considered the actual value of WesPac's land in deciding "fair value" as of the merger date.

On July 18, 1983, petitioners timely filed a petition for appraisal in Delaware Chancery Court. In their answer, respondents once again unequivocally stated they saw no obstacle to application of the Delaware appraisal law:

> In response to the allegations set forth in paragraph 6 of the petition, WPRR [WesPac] avers that were the Court to determine that petitioners have complied with Section 262 of the General Corporation Law of the State of Delaware, they would be entitled to an appraisal of WPRR shares held by them of record and that other stockholders who have likewise complied with Section 262 would also be entitled to an appraisal of shares held by them of record.

WesPac did not argue that the Chancery Court lacked jurisdiction or that § 262 was preempted, and so the appraisal action went forward. Extensive and expensive pretrial discovery consumed the following year and a half. During this time, respondents never once suggested to petitioners or to the Delaware Chancery Court that the Court lacked jurisdiction or that the appraisal statute was preempted.

In March 1985, the Chancery Court set a trial date for the appraisal. By this point, petitioners' pre-trial discovery had shown that the value of WesPac shares was even greater than disclosed in the merger proxy statement, because of still undisclosed value of WesPac's industrial land holdings not used in railroad operations.

Then, on the eve of trial, six years after first announcing their promise not to object to appraisal and after two years of pre-trial discovery and numerous reiterations of their promise, Union Pacific and WesPac unilaterally reneged on their agreement. Without Court prompting and on their own, they wrote to the Chancery Court on March 29, 1985, raised *Schwabacher* and sought to deprive WesPac stockholders of their day in Court on grounds that the Interstate Commerce Act preempts the appraisal statute (*see* A6). Respondents followed this letter with other letters and, ultimately, with briefs in which they strenuously argued in favor of preemption and dismissal of the appraisal proceeding based on *Schwabacher*. Union Pacific and WesPac had said nothing to the Chancery Court about *Schwabacher* for almost two years, from the day the appraisal proceeding was filed—July 18, 1983—until their

March 29, 1985 letter. They gave no explanation for their long silence and sudden about-face, nor for their unilateral assertion of *Schwabacher* as a bar to appraisal, although they had told two Federal courts, including this Court, the ICC and WesPac stockholders that they would not use *Schwabacher* to defeat jurisdiction.

On August 29, 1985, the Delaware Chancery Court reluctantly dismissed the appraisal proceeding for lack of jurisdiction, deciding that, under the authority of *Schwabacher,* § 11341(a) preempts Del. Code Ann. tit. 8, § 262. The Vice-Chancellor stated (A8):

> Were it not for the fact that this Court's jurisdiction has been called into question, I would not hesitate to proceed with the trial. Respondents' representations to the WesPac stockholders and their position before the Court of Appeals should, as a matter of equity, preclude them from advancing a contrary position in this Court.

On March 7, 1986, the Supreme Court of Delaware, after oral argument in which that Court was highly critical of Union Pacific for its "empty agreement" with WesPac stockholders (*see* A23-24), affirmed the Chancery Court's decision because it believed that it was bound to do so by *Schwabacher* (A2).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE SUPREME COURT OF DELAWARE INCORRECTLY DETERMINED AN IMPORTANT ISSUE OF FEDERAL LAW AND CONFLICTS WITH DECISIONS OF TWO FEDERAL COURTS OF APPEALS.

The Delaware Supreme Court, in affirming the decision of the Chancery Court, incorrectly held that § 11341(a) preempts the Delaware appraisal statute, Del. Code Ann. tit. 8, § 262. This decision, that the exemption allowed by § 11341(a) applies automatically because of the mere existence of an ICC-approved consolidation, flies in the face of the statutory language, conflicts with the most recent construction of § 11341(a) by both the Fifth and District of Columbia Circuit Courts of Appeals and misapplies the Court's decision in *Schwabacher*.

A. By its Language, the Interstate Commerce Act Does Not Preempt State Statutes.

Section 11341(a) of Title 49 U.S.C. provides, in relevant part:

> *The authority of the Interstate Commerce Commission under this subchapter is exclusive.* A carrier or corporation participating in or resulting from a transaction approved or exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. *A carrier, corporation, or person participating in that approved or exempted transaction*

> *is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.*

(*emphasis supplied*)

This is the only place in the Interstate Commerce Act where Congress addressed the Act's effect on other laws. Demonstrably, by the very language used, Congress did not decree that all state laws impacting upon common carrier consolidations would be "preempted" by the Interstate Commerce Act. Rather, Congress legislated a more limited effect, using the term "exemption" to decree the Act's impact upon federal, state and municipal law. Indeed, as written, the Act does not preempt laws, but rather, provides an exception personal to a "carrier, corporation, or person." The Delaware Supreme Court's conclusion that § 11341(a) preempts state law is belied by the language of the Act itself, and this statutory language is controlling: "We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). If Congress intended the Act to preempt state statutes, it would have specifically said so, as it has frequently done as a matter of course. *See, e.g.*, ERISA, 29 U.S.C. § 1144(a).

B. The Delaware Supreme Court's Construction of Section 11341(a) is in Conflict with the Decisions of the District of Columbia and Fifth Circuits.

Under § 11341(a), for a carrier, such as Union Pacific, to be entitled to an exemption from other law, state or federal, three conditions must occur. *First*, the ICC must approve the transaction, pursuant to its exclusive approval authority granted by the first sentence of § 11341(a). *Second*, the exemption from state law must be "necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction." *Third*, the ICC must find, as part of the approval process, that the exemption requested by the carrier is necessary to effectuate the merger transaction. *Brotherhood of Locomotive Engineers v. ICC*, 761 F.2d 714 (D.C. Cir. 1985), *cert. granted*, 54 U.S.L.W. 3630 (U.S. March 24, 1986) (Nos. 85-792, 85-793); *City of Palestine, Texas v. United States*, 559 F.2d 408 (5th Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

The Delaware Supreme Court totally did away with the second and third requirements, ruling that the railroads were entitled to an exemption from the appraisal statute automatically by virtue of ICC approval of the consolidation. This decision directly conflicts with the District of Columbia Circuit's decision in *Brotherhood of Locomotive Engineers*, which has been accepted for review by this Court, and the Fifth Circuit's decision in *City of Palestine, Texas v. United States*.

In the *City of Palestine* case, the Missouri Pacific had contracted to maintain at Palestine a certain percentage of

its employees in specified classifications. As part of its later consolidation with two other railroads, Missouri Pacific sought and the ICC agreed to grant the transaction an exemption from this agreement and its enforcement under Texas state law. *Id.*, 559 F.2d at 411-412. The Fifth Circuit reversed, holding that the ICC could grant exemptions from state restraints on mergers only insofar as those exemptions were necessary to effectuate the merger. The Palestine agreement did not qualify:

> In its grant of approval authority, Congress did not issue the ICC a hunting license for state laws and contracts that limit a railroad's efficiency unless those laws or contracts interfered with carrying out an approved merger. . . . Section 5(11)'s description of the freedom enjoyed by carriers in an approved merger recognizes that the carriers' immunity from state law extends only "*insofar as may be necessary to enable them to carry into effect* the transaction so approved or provided for. . . ." 49 U.S.C. § 5(11) (1970) (emphasis supplied). These words express a practical limitation on the power of the ICC. The ICC's pursuit of the public interest focuses on its approval of railroad mergers, consolidations, acquisitions, and other section 5(2) transactions. Actions taken by the ICC in connection with those transactions but not necessary to them exceed the scope of its authority. In section 5(11) Congress clearly expresses a sensitivity to state law: the ICC's approval may overturn state law only where "necessary to carry into effect" the transaction.

Id., 559 F.2d at 414.

Thus, that Court concluded that the exemption authority of § 5(11) (the predecessor to § 11341[a]) can only operate when the ICC uses it: "From this statutory scheme we

deduce that Congress intended to empower *the ICC* to set aside state law restraints only insofar as necessary to assure the effectuation of approved transactions." *Id.*, 559 F.2d at 415 (*emphasis supplied*).

More recently, in *Brotherhood of Locomotive Engineers v. ICC, supra,* the District of Columbia Circuit reached the identical result. In the same Union Pacific-WesPac merger at issue here, the ICC assertedly exempted the merger from application of the Railway Labor Act. *Id.*, 761 F.2d at 716-717. The Court of Appeals reversed, ruling that the ICC had failed to find that the exemption was necessary to effectuate the merger. *Id.*, 761 F.2d at 722. The Court held that exemptions do not automatically inure to approved transactions but operate only when the ICC exercises its exemption authority in accordance with § 11341(a)'s standard:

> The statutory language dictates that the Commission's exemption authority applies only "as necessary" to allow transactions to occur. 49 U.S.C. § 11341(a). Congress has given ICC broad powers to immunize transactions from later legal obstacles, but this delegation by Congress is explicitly qualified by a necessity component. The statute thus requires that the exemption authority operate according to necessity, not according to whim or caprice.
>
> This statutory limit on the Commission's authority creates certain responsibilities for ICC. In exercising its waiver authority ICC must do more than shake a wand to make a law go away. It must supply a reasoned basis for that exercise of its statutory authority.

Brotherhood of Locomotive Engineers v. ICC, 761 F.2d at 723.[1]

Both decisions are expressly in accord with the settled precedent of this Court. In *Callaway v. Benton*, 336 U.S. 132 (1949), the Court made clear that § 5(11) does not operate automatically, but the ICC must exercise its exemption authority to "override state laws interposing obstacles in the path of otherwise lawful plans of reorganization." *Id.*, 336 U.S. at 140-141.

Here, the effectuation of the merger would in no way be restrained or affected by implementation of the Delaware appraisal statute. Respondents so stated to the D.C. Circuit (A36). In short, the carrying out of Delaware's statutory appraisal proceeding posed no obstacle to the subject merger.

Further, the ICC recognized that it must exercise its exemption authority to abrogate laws interfering with mergers. Again in the Union Pacific-WesPac merger, intervenor Southern Pacific Transportation Company argued that the merger should not proceed because it violated the Pacific Railroads Acts, 45 U.S.C. § 83. *See* 366

1. *But see Brotherhood of Locomotive Engineers v. Boston & Maine Corporation*, No. 85-1852, slip op. (1st Cir. April 9, 1986). Here, the Brotherhood of Locomotive Engineers ("BLE") sued for alleged violations of the Railway Labor Act ("RLA") by the Boston and Maine Corporation ("B&M"). The First Circuit held that the ICC had specifically exempted the railroad from the RLA under § 11341(a) in granting B&M approval to lease a portion of its track to another railroad, and dismissed the BLE action. In an apparent contradiction to this finding that § 11341(a)'s exemption applied because of this specific ICC action exempting the transaction from the RLA, the Court stated that § 11341(a)'s exemption provision is "self-executing."

I.C.C. at 548. The ICC complied with its responsibility and expressly found that exemption from that specific statute was necessary to the merger: "Although it appears that the UP/WP consolidation may potentially violate the nondiscrimination provisions of the Pacific Railroad Acts, we have determined that we can and should immunize the consolidation from operation of those provisions." 366 I.C.C. at 548-549.

The ICC left the Delaware appraisal statute intact in approving the Union Pacific-WesPac consolidation. Not only was there no objection to its application, but Union Pacific, the carrier presumably entitled to the exemption, affirmatively represented that it would afford appraisal rights and that it would not object to being subject to Del. Code Ann. tit. 8, § 262.

Despite Union Pacific's representations and the weight of authority that an ICC finding of necessity was required to immunize the merger transaction from the Delaware statute, the Delaware Courts held § 262 automatically preempted without an ICC finding. This Court should resolve the conflict between this holding and the decisions of the Fifth and District of Columbia Circuits by adopting the Court of Appeals' interpretation of § 11341(a) and reversing the decision of the Delaware Supreme Court.[2]

2. If let stand, the decision below has far-reaching implications. ICC authority over common carrier consolidations goes far beyond railroads and encompasses an "express carrier, a pipeline carrier, a rail carrier, a sleeping car carrier, a motor common carrier, a water common carrier and a freight forwarder." 49 U.S.C. § 10102(4). Under § 11341(a), the ICC approves mergers, consolidations, acquisitions of control of a carrier by any entity that is not a carrier but that controls any number of carriers, and acquisitions of at least two car-

(footnote continued on next page)

C. The Delaware Courts Misinterpreted *Schwabacher*.

Schwabacher involved the merger of the Pere Marquette Railway Company ("Pere Marquette") into the Chesapeake & Ohio Railway Company ("C&O"). Appellants owned Pere Marquette $100 par, 5% cumulative preferred stock upon which $72.50 in dividends were in arrears and unpaid. The merger provided that these Pere Marquette preferred shareholders would receive an amount of C&O stock and no consideration for their accumulated unpaid dividends. The shareholders claimed that under Pere Marquette's charter, they were entitled to receive payment for their stock at par plus the unpaid dividends upon dissolution or wind-up of the corporation and, under Michigan law, the merger constituted such a dissolution or winding up.

On the C&O's application for approval of the consolidation, the ICC determined that the merger terms were just and reasonable for all classes of stockholders and approved the merger. However, the ICC, in its decision, disclaimed jurisdiction to adjudicate the claims of the preferred shareholders for unpaid dividends under Michigan law. *Schwabacher*, 334 U.S. at 187.

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riers by a non-carrier. 49 U.S.C. § 11343(a). Consolidations involving potentially hundreds of corporations, some of which operate common carriers and some of which do not, are subject to ICC approval and have potential exemptions from a variety of state laws under § 11341(a).

These corporations are chartered by and subject to state law. All fifty states have statutes, similar to Delaware's appraisal statute, providing dissenting shareholders, dissatisfied with merger terms, the right to an appraisal of their equity interest. Allowing the decision below to stand will result in automatic abrogation of these laws and of dissenting shareholders' rights in untold number of mergers where one or more of the merger participants happens to own or operate an interstate common carrier.

This Court reversed and held that the ICC had improperly ceded its authority when it declined to consider the rights, under Michigan law, of the preferred stockholders in determining whether the merger price was fair:

> While the Commission has found that what the appellants are given in this plan is just and reasonable, the record indicates that it may have declined to consider these claims, even if they are found to have some effect on the intrinsic value of the stock, because it thought it lacked jurisdiction. Under these circumstances, we cannot be sure that in arriving at its conclusion that the plan was just and reasonable it did not exclude some factors that it should consider under the views set out in this opinion. We therefore reverse the judgment below and remand the case to the Commission for reconsideration under the principles herein expressed.

Schwabacher, 334 U.S. 201-202.

Thus, in *Schwabacher*, the Court addressed what Congress intended by the first sentence of 49 U.S.C. § 11341(a), which deals with the exclusive authority of the ICC to approve mergers. It did not address what Congress intended in the third sentence of § 11341(a), when Congress provided that a carrier participating in a transaction already approved by the ICC is exempt from all law "as necessary to let that person carry out the transaction." 49 U.S.C. § 11341(a). Certainly the two sentences are related; but it does not follow that the ICC, simply by exercising its exclusive statutory authority to approve railroad consolidations, automatically abrogates all statutes that affect railroads in those mergers.

More importantly, *Schwabacher* simply did not address the circumstances under which the exemption permitted by

Congress in § 11341(a) may be waived by the merger participant entitled to claim the exemption. Union Pacific, by its representations to WesPac stockholders, to the ICC, to the D.C. Circuit and to this Court, unquestionably waived its § 11341(a) exemption. Cognizant of this waiver and Union Pacific's promise not to raise *Schwabacher*, the ICC approved the merger as fair to WesPac's minority stockholders, the D. C. Circuit affirmed and certiorari was denied.

II.

THIS COURT HAS ALREADY GRANTED CERTIORARI IN A CASE RAISING VIRTUALLY THE IDENTICAL ISSUE.

On March 24, 1986, this Court granted petitions for certiorari to review the decision of the District of Columbia Circuit in *Brotherhood of Locomotive Engineers v. ICC*, 761 F.2d 714 (D.C. Cir. 1985), *cert. granted*, 54 U.S.L.W. 3560 (U.S. March 24, 1986) (Nos. 85-792, 85-793). The questions presented by these petitions are virtually the same as those raised here: "Whether the Interstate Commerce Commission, when approving a transaction pursuant to 49 U.S.C. §§ 11343 and 11344, is required to make specific findings of necessity pursuant to 49 U.S.C. § 11341(a) in order to exempt the carriers participating in the approved transaction from the requirements of the Railway Labor Act." *Id.*, Appendix I at A50; *see also* A48. The merger at issue in the *Brotherhood* case is the same merger implicated by this petition. The fact that these petitions address the effect of the Interstate Commerce Act on the Railway Labor Act is immaterial, as the language of § 11341(a) makes no distinction between federal, state or municipal law in setting forth the conditions for an exemption to apply.

III.

THE JUDGMENT BELOW PERMITS A GROSS ABUSE OF THE FEDERAL ADMINISTRATIVE AND JUDICIAL PROCESS.

Respondents Union Pacific and WesPac time and again point-blank informed the ICC, the District of Columbia Circuit and this Court—as well as the WesPac shareholders—that they neither needed, wanted, nor were entitled to an exemption from the Delaware appraisal statute. Union Pacific repeatedly stated that the Delaware appraisal remedy was an available option for WesPac stockholders not satisfied with the $20 merger price. With these representations, the ICC approved the Union Pacific-WesPac merger as fair and reasonable; the D.C. Circuit affirmed this approval, upon assurance by Union Pacific that "a forum exists in Delaware" to resolve claims of minority shareholders that the $20 merger price was unfair (A36-A37); and this Court denied certiorari being told that "dissenting shareholders who pursue their remedies in Delaware presumably won't be deprived" of their day in Court.

Further, over 100 WesPac stockholders, having read Union Pacific's promise that it would not claim that § 11341(a) preempted the Delaware appraisal statute, and realizing the potential of their appraisal claims under Delaware law, actively pursued their appraisal rights in Delaware Chancery Court. These stockholders gave up the right to receive $20 immediately on the tender offer more than six years ago, awaited the 1983 merger and diligently prosecuted their appraisal proceeding in order to receive fair value for their WesPac stock.

Simply, but fairly put, Union Pacific and WesPac lied to shareholders, the ICC, the Court of Appeals and this Court. Two months before trial of the appraisal was to begin, Union Pacific first argued that § 11341(a) "preempts" the appraisal statute. *Bruno v. Western Pacific*, 498 A.2d 171, 172 (Del. Ch. 1985) (A7). Only then, after regulatory and judicial approval of the consolidation was final, did Union Pacific reverse itself and claim an exemption from Delaware law (A2-A3).[3]

Both the Delaware Supreme Court and Chancery Court expressed outrage and dismay at respondents' blatant misrepresentations to courts, regulatory authorities and shareholders. Unfortunately, both Courts believed, incorrectly, that their hands were tied by this Court's decision in *Schwabacher v. United States*, 334 U.S. 182 (1948), and, therefore, believed they could not address respondents' conduct. This Court faces no such impediment. When a multi-billion dollar corporation claims for six years that it will not invoke a decision of this Court and then, to defeat the state-created rights of over one hundred stockholders, turns around and hides behind that very same decision to avoid its promise, the precedent of this Court and the entire judicial process has been sorely misused. Even if *Schwa-*

3. After the Delaware appraisal proceeding was dismissed, petitioners filed an action in the United States District Court for the Southern District of New York. Petitioners charge Union Pacific with violating §§ 10(b) and 14(a) of the Securities and Exchange Act of 1934 based on misrepresentations in the merger proxy statement and a course of conduct designed to deceive WesPac stockholders about their "contract" not to object to appraisal, as well as with breach of contract. Union Pacific has moved to dismiss this action on grounds, *inter alia*, that plaintiffs' claims for proxy fraud, § 10(b) misrepresentation and breach of contract are also preempted under the reasoning of *Schwabacher*.

bacher applied, which it does not (*see* Point I. C., *above*), in these circumstances this Court should not permit Union Pacific to use *Schwabacher* to defeat Delaware appraisal.

Conclusion

For the foregoing reasons, petitioners respectfully request that the Court issue a writ of certiorari to review the Opinion and Order of the Supreme Court of Delaware.

Respectfully submitted,

RONALD LITOWITZ
(Counsel of Record)
DANIEL L. BERGER
BERNSTEIN LITOWITZ BERGER
& GROSSMANN
875 Third Avenue
New York, New York 10022
(212) 751-6100
Counsel For Petitioners

Dated: May 29, 1986

APPENDICES

APPENDIX A

IN THE

SUPREME COURT OF THE STATE OF DELAWARE

No. 323, 1985

Court Below:
Court of Chancery
of the State of Delaware,
New Castle County,
C.A. No. 7250

DANIEL A. BRUNO and PHILIP R. HERZIG,

Petitioners Below,
Appellants,

v.

WESTERN PACIFIC RAILROAD COMPANY, a Delaware Corporation, and UNION PACIFIC CORPORATION, a Foreign Corporation,

Respondents Below,
Appellees.

Submitted: February 25, 1986

Decided: March 7, 1986

Before

CHRISTIE, Chief Justice, McNEILLY and MOORE, Justices.

ORDER

This 7th day of March, 1986,

It appears to the Court that:

(1) Appellants are former stockholders of Western Pacific Railroad Company (WesPac) and appeal from the

dismissal by Court of Chancery of their statutory stock appraisal proceedings brought pursuant to 8 *Del.C.* § 262.

(2) The Vice Chancellor dismissed the appraisal proceedings for want of subject matter jurisdiction by reason of the United States Supreme Court decision in *Schwabacher* v. *United States,* 334 U.S. 182 (1948), which held that with respect to common carrier mergers governed by the Interstate Commerce Act, as here, "no rights alleged to have been granted to dissenting stockholders by state law provision concerning liquidation survive the merger agreement approved . . . by the Commission as just and reasonable." *Id.* at 201. The cash-out merger here involved was so approved by the Commission on September 24, 1982.

(3) In the case at bar, appellants contend that the Interstate Commerce Act governing common carrier mergers contains no language indicating that the Act preempts or supersedes, or intends to preempt or supersede, state laws such as the Delaware stock appraisal statute available to those stockholders dissatisfied with the merger cash-out price, and that *Schwabacher* made no finding that an exemption from the Delaware appraisal statute was required to effectuate the Union Pacific-WesPac merger.

(4) Our reading of the Act and the *Schwabacher* opinion satisfies us there is no merit in these contentions.

(5) Additionally, petitioners contend that in any event, Union Pacific waived such an exemption by reasons of its

no-contest representations throughout the merger negotiations, contained in the tender offer, proxy statement, and otherwise, whereby it was made clear to the stockholders that in spite of *Schwabacher*, no objection would be made by WesPac to dissatisfied stockholders instituting appraisal proceedings pursuant to 8 *Del.C.* § 262.

(6) Despite these representations, WesPac, on the eve of trial in the Court of Chancery concerning appellants' appraisal rights, felt compelled to and did strenuously oppose subject matter jurisdiction under *Schwabacher*.

(7) The Vice Chancellor expressed dissatisfaction and annoyance with Respondents'/Appellees' strategy and representations to the WesPac stockholders obviously directed to obtaining stockholder approval of the proposed merger while leading the unsophisticated and unwary stockholders to believe that they might successfully seek a higher cash-out price through the Delaware appraisal statute. As stated in the Vice Chancellor's opinion:

> Respondents' representations to the WesPac stockholders and their position before the Court of Appeals should, as a matter of equity, preclude them from advancing a contrary position in this Court. However, in the absence of subject matter jurisdiction, a decision in this proceeding would be a nullity. *Dover* v. *Philadelphia Housing Authority*, Pa. Super., 465 A.2d 644 (1983). The parties to an action may not confer subject matter jurisdiction by agreement, *Maxwell* v. *Vetter*, Del. Supr., 311 A.2d 864 (1973), and the Court cannot acquire

jurisdiction by estoppel. *Bruce E. M.* v. *Dorothea A. M.*, Del. Supr., 455 A.2d 866 (1983). Accordingly, this Court must decide the jurisdictional question notwithstanding respondents' prior representations or its "contract" with the WesPac dissenters.

(8) To the extent the issues on appeal involve matters governed by federal law clearly those issues are controlled by settled federal law, and to the extent the issues involve questions of fact clearly there is sufficient evidence in the record to support the findings of the Vice Chancellor.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Court of Chancery be, and it hereby is,

AFFIRMED.

BY THE COURT:

/s/ JOHN J. McNEILLY,
Justice

APPENDIX B

IN THE
COURT OF CHANCERY OF THE
STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Civil Action 7250 CONSOLIDATED

DANIEL A. BRUNO, PHILIP R. HERZIG, EDWARD A. ROGERS, EDWARD A. ROGERS and ETHEL ROGERS, as joint tenants, and GUARANTEE AND TRUST CO., TRUSTEE FBO EDWARD ROGERS,
Petitioners,

and

DREXEL BURNHAM LAMBERT INCORPORATED, a Delaware corporation,
Intervenor,

v.

WESTERN PACIFIC RAILROAD COMPANY, a Delaware corporation, and UNION PACIFIC CORPORATION, a foreign corporation,
Respondents.

Date Submitted: July 16, 1985
Date Decided: August 9, 1985

Joseph A. Rosenthal, Esquire, MORRIS & ROSENTHAL, P.A., Wilmington, Attorneys for Petitioners in C. A. No. 7250

Eliot Alazraki, Esquire, ELIOT ALAZRAKI, P. A., Wilmington, Attorneys for Petitioners in C. A. No. 7274

Vernon R. Proctor, Esquire, PRICKETT, JONES, ELLIOTT, KRISTOL & SCHNEE, Wilmington, Attorneys for Intervenor

R. Franklin Balotti, Esquire, RICHARDS, LAYTON & FINGER, Wilmington, Attorneys for Respondents

BERGER, V.C.

Petitioners filed this appraisal action pursuant to 8 *Del. C.* §262 following the cash-out merger between respondents, Western Pacific Railroad Company ("Wes Pac") and Union Pacific Corporation ("Union Pacific"). With a trial date rapidly approaching, respondents have questioned this Court's subject matter jurisdiction inasmuch as this merger between two railroads was approved by the Interstate Commerce Commission ("ICC") as "just and reasonable." At the direction of the Court, the parties briefed the issue of whether Subchapter III of the Interstate Commerce Act, 49 *U.S.C.* §11341, *et seq.* (the "Act"), preempts an appraisal remedy in this Court under the holding in *Schwabacher* v. *United States*, 334 U.S. 182 (1948).

On January 22, 1980 respondents entered into a merger agreement whereby Wes Pac would be merged into a wholly-owned subsidiary of Union Pacific. The following day, in accordance with the agreement, Union Pacific commenced a tender offer for any or all shares of Wes Pac at $20 per share. In its Offer to Purchase, Union Pacific disclosed that those Wes Pac stockholders who dissented from the second step merger might not be entitled to appraisal under the holding in *Schwabacher*. However, the stockholders were informed that Union Pacific "has agreed that in the event the Merger is consummated, it will not object if, holders of Shares not owned by the Purchaser seek the right to dissent and demand appraisal of their Shares under Delaware law." Approximately 77% of the Wes Pac common stock outstanding was tendered.

Following the tender offer, in September, 1980, Union Pacific applied for ICC approval of the proposed merger. The ICC's 1982 decision approving the merger was appealed to the United States Court of Appeals for the District of Columbia Circuit. On appeal, respondents took the position that *Schwabacher* did not eliminate the right to appraisal because "by contract" Union Pacific had allowed the Wes Pac stockholders to seek appraisal under the Delaware statute. The Court of Appeals affirmed the ICC's stock valuation determination, finding that its methodology was reasonable and its conclusions supported by substantial evidence. *Southern Pacific Transportation Co. v. ICC*, 736 F.2d 708, 726 (D.C. Cir. 1984), *cert. denied sub nom., Kansas City Southern Railway Co. v. United States*, 105 S.Ct. 1171 (1985).

Respondents proceeded with the merger while the ICC's decision was on appeal. In the merger proxy statement dated May 2, 1983, the Wes Pac stockholders again were advised of the holding in *Schwabacher* and that, "[n]evertheless, Union Pacific has agreed that it will not object if [Wes Pac stockholders] demand appraisal. . . ." The merger was approved at a stockholder's meeting on May 24, 1983. However, a large percentage of the minority stockholders dissented from the merger and are attempting to exercise their appraisal rights.

Petitioners instituted this appraisal proceeding in July, 1983 and trial has been scheduled to begin on September 16, 1985. By letter dated March 29, 1985, counsel for respondents brought *Schwabacher* to the Court's attention and suggested that this Court lacks jurisdiction to hear the appraisal claims.

Were it not for the fact that this Court's jurisdiction has been called into question, I would not hesitate to proceed with the trial. Respondents' representations to the Wes Pac stockholders and their position before the Court of Appeals should, as a matter of equity, preclude them from advancing a contrary position in this Court. However, in the absence of subject matter jurisdiction, a decision in this proceeding would be a nullity. *Dover* v. *Philadelphia Housing Authority,* Pa. Super., 465 A.2d 644 (1983). The parties to an action may not confer subject matter jurisdiction by agreement, *Maxwell* v. *Vetter,* Del. Supr., 311 A.2d 864 (1973), and the Court cannot acquire jurisdiction by estoppel. *Bruce E. M.* v. *Dorothea A. M.,* Del. Supr., 455 A.2d 866 (1983). Accordingly, this Court must decide the jurisdictional question notwithstanding respondents' prior representations or its "contract" with the Wes Pac dissenters.

The Interstate Commerce Act grants the ICC exclusive jurisdiction to consider and approve certain mergers and consolidations. 49 *U.S.C.* §11341, *et seq.* The Act sets forth the types of transactions to which the ICC's approval authority applies (§11343) and the considerations which guide that decision (§11344). The section of the Act at issue provides:

> The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation participating in or resulting from a transaction approved by or exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without

> the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. 49 *U.S.C.* §11341(a).

In *Schwabacher*, the Supreme Court analyzed the predecessor to §11341. That case involved the merger of Pere Marquette Railway Company ("Pere Marquette"), a Michigan corporation, with the Chesapeake and Ohio Railway Company ("C&O"), a Virginia corporation. At the time of the merger, dividends on Pere Marquette's cumulative preferred stock were in arrears in the amount of $72.50 per share but the value of the C&O stock to be exchanged in the merger for the Pere Marquette preferred stock did not include the amount of the accumulated unpaid dividends. Appellants claimed that the merger constituted a dissolution or winding up and that, under Michigan law, they were entitled to receive payment for their shares at par plus unpaid dividends.

The ICC held that the merger terms were just and reasonable as to each class of stockholders and approved the merger. However, the ICC declined to decide the Michigan law question, stating that Pere Marquette and C&O were free to settle controversies with dissenting stockholders through negotiation and litigation in the courts. The ICC did find that any additional amounts which might be payable as a result of further action by the dissenting stockholders would not involve a burden of excessive expenditure

considering C&O's assets and the maximum possible cost that would be involved in resolving the dissenter's claims.

The Supreme Court reversed, holding that liquidation rights granted to dissenting stockholders by state law do not survive the ICC's approval of the merger as just and reasonable. After reviewing the history of the Act, the Court stated:

> It appears to us inconsistent with the Interstate Commerce Act for the Commission to leave claims growing out of the capital structure of one of the constituent companies to be added to the obligations of the surviving carrier, contingent upon the decision of some other tribunal or agreement of the parties themselves. We think that the Commission must pass upon and approve all capital liabilities which the merged company will assume or discharge as a result of the merger.
>
> * * *
>
> We think the Commission was in error in assuming that it did not have, or was at liberty to renounce or delegate, power finally to settle the amount of capital liabilities of the new company and the proportion or amount thereof which each class of stockholders should receive on account of its contributions to the new entity.

Schwabacher v. *United States, supra* at 197-98 (footnote omitted).

The Court noted that the ICC's jurisdiction is "plenary" and "exclusive" and held that, "no rights alleged to have been granted to dissenting stockholders by state law provision concerning liquidation survive the merger agreement approved . . . by the Commission as just and reasonable." *Id.* at 201.

Consistent with the language quoted above, *Schwabacher* has been applied in more recent decisions holding that dissenting stockholders' state law rights are preempted by ICC approval of the merger at issue. In *Altman* v. *Central of Georgia Railway Company*, 488 F.2d 1302 (D.C. Cir. 1973), for example, the court affirmed the dismissal of a state law action to compel the payment of dividends on preferred stock, holding:

> It would appear, thus, that *Schwabacher* is dispositive of the litigation before us. Appellants' claim of right to additional dividends derives solely from state law, and it does not survive the final order of the Commission approving the consolidation, . . . *Id.* at 1305.

Similarly, in *Suffin* v. *Pennsylvania Railroad Company*, 276 F. Supp. 549 (D. Del. 1967), *aff'd.*, 396 F.2d 75 (3rd Cir. 1968), *cert. denied*, 393 U.S. 1062 (1969), after concluding that *Schwabacher* applies to the statutory provision governing ICC approval of securities transactions as well as the provision governing mergers, the court held that it lacked subject matter jurisdiction to hear a derivative suit challenging the terms of an ICC approved exchange of certain railroad securities. *See also Stott* v. *United States*, 166 F. Supp. 851, 859 (S.D.N.Y. 1958) (ICC, in approving merger, looks only to the Act and dissenting stockholders are not entitled to any special rights conferred on them as dissenters under state law); *Fried* v. *United States*, 212 F. Supp. 886 (S.D.N.Y 1963) (same).

Petitioners contend that the Act does not preempt state statutes relating to dissenters' rights. Instead, §11341 exempts railroad mergers from such state laws "as neces-

sary'' to carry out the transaction. An exemption, they argue, must be based upon a factual determination by the ICC that the exemption is required and an exemption may be waived. From this premise, petitioners argue that exemption is not necessary in this case where Union Pacific has assets in excess of $10 billion. Alternatively, petitioners contend that respondents have waived any exemption as to the Delaware appraisal statute by their prior conduct noted above. Petitioners submit that *Schwabacher* does not apply because the Court there only addressed the ICC's merger approval authority and not its exemption authority.

Petitioners' argument relies upon an overly narrow reading of *Schwabacher* and on other federal authority which is distinguishable. The Supreme Court in *Schwabacher* necessarily passed upon the ICC's ''exemption authority'' in analyzing its merger approval authority. For example, in discussing the standards governing the ICC's decisions, the Court noted that the merger must be in the public interest and that the merger terms must be just and reasonable to the stockholders. If those merger terms were subject to alteration by separate state law proceedings, the Court stated that the ''just and reasonable'' determination would be ''largely meaningless.'' *Schwabacher* v. *United States, supra* at 198-199. Following an anaylsis of the factors relevant to a stock valuation under the Act, the Supreme Court concluded:

> When stockholders are given what it is just and reasonable they should have, the Interstate Commerce Act does not permit state law to impose greater obligations on the financial structure of the merging railroads with

> consequent increased calls upon their assets or earning capacity. *Id.* at 201.

Thus, the *Schwabacher* decision effectively holds that state laws providing dissenters' rights are necessarily exempted under the Act.

The cases relied upon by petitioners as evidence of a more limited interpretation of *Schwabacher* do not involve state laws governing stockholders' rights. In *City of Palestine, Texas* v. *United States,* 559 F.2d 408 (5th Cir. 1977), *cert. denied,* 435 U.S. 950 (1978), the Court held that the ICC had exceeded its merger approval authority by voiding a contract which was not germane to the success of the merger. The contract, between Missouri Pacific Railroad Company ("Mo-Pac") and the City of Palestine Texas, required Mo-Pac to maintain a specified number of employees in Palestine. The Court noted that the Palestine Agreement, although a burden on Mo-Pac, presented no obstacle to the merger and that the ICC's approval of a merger may overturn state law only where necessary to carry out the transaction. Since the Palestine Agreement did not affect the merger, the ICC was without authority to nullify Mo-Pac's contractual obligations.

It is noteworthy that the Court in *City of Palestine* distinguished *Schwabacher* as being a case where the stockholders insisted upon compensation in excess of the amount found just and reasonable by the ICC. *Schwabacher* and two other authorities were described as being "cases approving the ICC's nullification of state law, [where] the laws stood in the way of the approved transaction." *Id.* at 415. Petitioners here, likewise, are seeking compensation beyond that found just and reasonable by the ICC.

The decision in *Brotherhood of Locomotive Engineers* v. *ICC*, 761 F.2d 714 (D.C. Cir. 1985) does not advance petitioners' argument either. In *Brotherhood* the court held that the ICC cannot exempt railroads from the provisions of the Railway Labor Act without supplying a reasoned basis for the conclusion that such an exemption is necessary to the transaction. In *Brotherhood* as in *City of Palestine*, the court distinguished *Schwabacher* as being a case where the preempted law posed an obstacle to the transaction. *Id.* at 723.

Based upon the foregoing, I conclude that *Schwabacher* is controlling and that this action must be dismissed for lack of subject matter jurisdiction. This holding does not purport to deny petitioners the right to pursue other claims relating to the merger. It is limited solely to the availability of the statutory appraisal proceeding. I request respondents to submit a form of order in accordance with this decision, on notice.

APPENDIX C

IN THE

COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

Civil Action 7250
CONSOLIDATED

DANIEL A. BRUNO, PHILIP R. HERZIG, EDWARD A. ROGERS, EDWARD A. ROGERS and ETHEL ROGERS, as joint tenants, and GUARANTEE AND TRUST CO., TRUSTEE FBO EDWARD ROGERS,
Petitioners,

and

DREXEL BURNHAM LAMBERT INCORPORATED,
a Delaware corporation,

v.

WESTERN PACIFIC RAILROAD COMPANY, a Delaware corporation, and UNION PACIFIC CORPORATION, a foreign corporation,
Respondents.

ORDER OF DISMISSAL

AND NOW, TO WIT, this 29th day of August, 1985, the Court having considered the briefs submitted by the parties concerning the subject matter jurisdiction of the Court over the issues presented in this action in light of *Schwabacher* v. *United States,* 334 U.S. 182 (1948).

IT IS HEREBY ORDERED for the reasons set forth in the Court's opinion dated August 9, 1985, that this action be, and hereby is, dismissed, each party to bear its own costs.

s/ CAROLYN BERGER,
Vice Chancellor

APPENDIX D

IN THE

COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

Civil Action No. 7250

DANIEL A. BRUNO and PHILIP R. HERZIG,
Petitioners,

and

DREXEL BURNHAM LAMBERT INCORPORATED,
a Delaware corporation,
Intervenor,

v.

WESTERN PACIFIC RAILROAD COMPANY,
a Delaware corporation,
Respondent.

Civil Action No. 7274

EDWARD A. ROGERS: EDWARD A. ROGERS and ETHEL ROGERS, as joint tenants; and GUARANTEE AND TRUST CO., TRUSTEE FBO EDWARD ROGERS,
Plaintiffs,

v.

THE WESTERN PACIFIC RAILROAD COMPANY, a Delaware corporation, and UNION PACIFIC CORPORATION, a foreign corporation,
Defendants.

ORDER OF CONSOLIDATION

It appearing that the above-captioned two actions have been filed involving the same subject matter and that the administration of justice would be best served by consolidating the actions, and upon agreement of the parties,

IT IS, this 24th day of April, 1985, ORDERED AS FOLLOWS:

1. The above-captioned actions are hereby consolidated for all purposes.

2. Hereafter papers need only be filed in Civil Action No. 7250.

3. The caption of the consolidated action shall be as follows:

CONSOLIDATED
Civil Action No. 7250

DANIEL A. BRUNO, PHILIP R. HERZIG, EDWARD A. ROGERS, EDWARD A. ROGERS and ETHEL ROGERS, as joint tenants, and GUARANTEE AND TRUST CO., TRUSTEE FBO EDWARD ROGERS,
Petitioners,

and

DREXEL BURNHAM LAMBERT INCORPORATED,
a Delaware corporation,
Intervenor,

v.

WESTERN PACIFIC RAILROAD COMPANY, a Delaware corporation, and UNION PACIFIC CORPORATION, a foreign corporation,
Respondents.

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4. All documents previously filed and served to date in either of the cases consolidated herein are deemed and adopted as and are a part of the record in the consolidated action.

5. The firm of Morris and Rosenthal, P.A. is hereby designated as liaison counsel for the petitioners. Hereafter, service need only be made on liaison counsel and counsel for the intervenor. The designation of Morris and Rosenthal, P.A. as liaison counsel in this action shall not be deemed to create an attorney-client relationship between said law firm and the plaintiffs in Civil Action No. 7274.

s/ M.A. Hartnett, III

Vice Chancellor

Consented To:

Morris and Rosenthal, P.A.

By s/ Joseph A. Rosenthal

One Customs House Square
P.O. Box 1070
Wilmington, Delaware 19899
Attorneys for Petitioners in C.A. No. 7250

Eliot Alazraki, P.A.

By s/

Suite 206,
913 Market Street
Wilmington, Delaware 19801
Attorneys for Plaintiffs in C.A. No. 7274

Prickett, Jones, Elliott, Kristol & Schnee

By s/

1310 King Street
P.O. Box 1328
Wilmington, Delaware 19899
Attorneys for Intervenor

Richards, Layton & Finger

By s/ R. F. Balotti

One Rodney Square
P.O. Box 551
Wilmington, Delaware 19899
Attorneys for Respondent Western Pacific Railroad Company

APPENDIX E

BEFORE THE

SUPREME COURT OF THE STATE OF DELAWARE

No. 323, 1985

DANIEL A. BRUNO and PHILIP R. HERZIG,

Petitioners Below,
Appellants,

v.

WESTERN PACIFIC RAILROAD COMPANY, a Delaware corporation, and UNION PACIFIC CORPORATION, a foreign corporation,

Respondents Below,
Appellees.

Supreme Court Courtroom
Courthouse
Dover, Delaware
Tuesday, February 25, 1986

BEFORE:

HON. ANDREW D. CHRISTIE, Chief Justice.
HON. JOHN J. McNEILLY, Justice.
HON. ANDREW G. T. MOORE, II, Justice.

ARGUMENT

CHANCERY COURT REPORTERS
135 Public Building
Wilmington, Delaware 19801
(302) 571-2447

APPEARANCES:

JOSEPH A. ROSENTHAL, ESQ.
MORRIS & ROSENTHAL, P.A.

and

DANIEL L. BERGER, ESQ. (New York Bar)
BERNSTEIN LITOWITZ BERGER & GROSSMANN
for Petitioners Below-Appellants.

R. FRANKLIN BALOTTI, ESQ.
RICHARDS, LAYTON & FINGER

and

LEONARD JOSEPH, ESQ. (New York Bar)
DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
for Respondents Below-Appellees.

* * *

THE CHIEF JUSTICE: Thank you. Mr. Joseph.

MR. JOSEPH: May it please the Court, I want to respond in a few minutes head on to the accusations about improprieties in Union Pacific's conduct or its counsel's conduct in informing the Chancery Court of the *Schwabacher* decision, if the Court determines that that's a relevant issue.

But what I would like to do at the outset is to bring the argument back to what is really the dispositive issue, as the Chief Justice indicated a moment ago, and that is: Was there jurisdiction in the Chancery Court, irrespective of any improprieties, which we obviously don't think existed.

The Chancery Court was correct, your Honor, in determining—and I agree reluctantly—that there was no jurisdiction in this situation in which the ICC, acting under its exclusive jurisdiction under the Interstate Commerce Act,

determined that the terms of this merger of interstate railroads were just and reasonable, including the $20-per-share merger price. Under the interpretation of the Interstate Commerce Act that the United States Supreme Court has given in the landmark *Schwabacher* case, that is the end of the matter.

Our friends on the other side say, "Well, in order to decide whether the Interstate Commerce Act means that, you have to look at the statute." That might be true, your Honors, if we were talking about a Delaware statute. But only the Supreme Court can determine, as the final controlling decision, what is the meaning of the Interstate Commerce Act. This Court, with deference, may not do that. And the Supreme Court has done that in the *Schwabacher* case.

The ICC had extensive hearings.

JUSTICE MOORE: Sometimes we do interpret federal statutes in Supreme Court opinions. We did that recently: Justice McNeilly's opinion in the *Moran* case, when we addressed a question of federal pre-emption.

MR. JOSEPH: I agree, your Honor, that you obviously have the right to determine what the Supreme Court meant in what it said. But if the Supreme Court is clear in interpreting a federal statute, I think that this Court is not permitted to say the Supreme Court was wrong in that interpretation.

JUSTICE MOORE: Why didn't you say all this to the stockholders? Why is this now being said to the stockholders and wasn't said to the stockholders in the materials? And to the Circuit Court in the District of Columbia.

MR. JOSEPH: What we said to the stockholders, your Honor, is in the record. It was said—

JUSTICE MOORE: Why wasn't it said to the stockholders? What you are saying to us today. Why was it said, "However, there can be no assurance a Delaware court will not on its own initiative determine that *Schwabacher* denies it."?

Now, that's implying that the company somehow or other doesn't consider that the issue is clear.

MR. JOSEPH: Your Honor, we said in the offer to purchase—there were two disclosures to the shareholders in documentary form, the offer to purchase shares and later the proxy statement preceding the merger. In the offer to purchase at page A133 of the appendix, we did say that, your Honor. We said, "In the opinion of counsel for the purchaser"—that's Union Pacific—"dissenting stockholders may not have any appraisal rights in view of the provisions of the . . . Interstate Commerce Act. In *Schwabacher* v. *United States* the Supreme Court of the United States, in construing the predecessors to those sections of the Interstate Commerce Act, held that appraisal rights granted by state law do not survive a merger agreement approved by the ICC as just and reasonable, such rights being, as a matter of federal law, accorded recognition in the ICC's obligation not to approve any merger which is not just and reasonable."

And then we went on to say, "However, the purchaser has agreed that in the event the merger is consummated, it will not object . . . ."

In the proxy statement, which is at page A62, from which my brother on the other side read a moment ago, we again said, "However, there can be no assurance that a Delaware court will not, on its own initiative, determine

that *Schwabacher* denies it jurisdiction over an appraisal proceeding commenced in connection with the merger in which case each dissenting shareholder shall receive $20 per share . . . ."

JUSTICE MOORE: And that implies that the company is not going to bring it to the Court's attention, but then the company did. Now, why did it do that?

MR. JOSEPH: Your Honor, not that it would not bring it to the attention of the Chancery Court, but that it would not object.

Now, "objecting" to me means, "We will not file some motion to dismiss on jurisdictional grounds." Your Honor's question—

THE CHIEF JUSTICE: How did what you did differ in substance from that?

MR. JOSEPH: Your Honor—

THE CHIEF JUSTICE: You raised the jurisdictional issue and then argued it. You are speaking of a difference in procedure which has no substance to it.

MR. JOSEPH: Your Honor, with deference to the Court, I think it has every bit of substance in this sense: We were told that there was going to be a trial. Vice Chancellor Berger was assigned and it looked like the case would be tried. There was now a dispositive jurisdictional issue which could not be waived. The other side was not bringing it to the attention of the Chancery Court. Under the Model Rules of Professional Conduct, your Honor—and I will give you the cite, if you wish—counsel has an obligation in the exercise of the required candor to the Court to bring to the attention of the Court any controlling decision.

Now, unless we had agreed that we would hide this jurisdictional decision from the Chancery Court, we did not

violate any representation. We never said we would hide the decision and we could not ethically have agreed to hide the decision.

THE CHIEF JUSTICE: But the agreement not to raise it, then, not to object, was an empty agreement.

MR. JOSEPH: It was an agreement not to move or to object, your Honor.

THE CHIEF JUSTICE: Simply to use a different method to call the same situation to the Court's attention.

MR. JOSEPH: Your Honor, when we wrote the letter—and your Honor may wish to look at the letter because I think it is clear on the issue—we said to the—

JUSTICE MOORE: What page are you referring to, Mr. Joseph?

MR. JOSEPH: A51, your Honor.

What we said in that letter: First we told the Vice Chancellor there is a decision of the United States Supreme Court in *Schwabacher* which relates to the Court's jurisdiction. We said, secondly, we have agreed that we won't object on that ground and we will raise no such objection in the Chancery Court. And third, we pointed out the disclosure that had been made, that the Chancery Court could, on its own initiative, make the determination that it had no jurisdiction.

At that point there was nothing in front of the Vice Chancellor, no request for judicial action, and if she wished she could have taken the position, which would have been wrong, I think, that, "Nobody has asked me to render any decision," and she could have gone to trial.

But how could we let her go to trial and hide from her—indeed, I think the obligation was on the other side as the

party invoking jurisdiction, but they had not disclosed it. How could we let the Vice Chancellor go to trial, conduct a substantial trial, which would ultimately be a nullity?

THE CHIEF JUSTICE: Well, if this were to be decided on the equities, in view of the statements made earlier, we would have a lot more things to talk about here. However, aren't we again having to get back to that—whether jurisdiction exists or does not exist in the Court, rather than the rather unusual actions taken by the railroad, saying one thing to the stockholders and then calling to the attention of the Court that which they weren't going to object to?

MR. JOSEPH: Your Honor, I certainly agree with you that the jurisdictional issue exists, apart from any—

THE CHIEF JUSTICE: It seems to me that it's the overriding issue here.

MR. JOSEPH: I agree with that, your Honor.

Let me just say this, if the Court has concern about the equities, even though they are not dispositive of the jurisdiction of the Court: Two weeks ago our friends on the other side filed an action in the Federal Court in New York against Union Pacific and Western Pacific alleging that the conduct of these corporations in bringing to the attention of the Chancery Court the existence of the *Schwabacher* decision and the jurisdictional issue was a breach of contract and a violation of federal securities laws and a variety of other wrongs. And that issue has now been presented by them to the Federal Court in New York. If they have a remedy—and we don't believe they do, but if they have a remedy they have asserted it there, and their remedy is not by asking this Court to distort clear jurisdictional principles in order to take heed of whatever equities they may have.

But if I may, let me return to the jurisdictional question. The only substantive argument that is made on the question whether *Schwabacher* does in fact deprive the Chancery Court of jurisdiction is the argument that they seek to construct that under the Interstate Commerce Act there was no pre-emption—there is no pre-emption; that in order for an exemption to exist from state appraisal proceedings two things must exist: The ICC in the exercise of some kind of discretion must invoke the exemption from state appraisal rights and the parties must not waive it.

Now, whatever might be the merit of that argument under the Interstate Commerce Act as an original question, it is completely inconsistent with the *Schwabacher* decision. First of all, there's nothing in the Interstate Commerce Act that says that, and they are really legislating in stating that. But more than that, in *Schwabacher,* the Supreme Court made it very clear that the ICC left to its own decisions had decided that there should be appraisal proceedings. So the ICC had invoked no exemption from state appraisal rights. On the contrary, the ICC had said, "We are perfectly happy to have state appraisal rights and, indeed, we determine as a matter of fact that state appraisal would not burden the merged railroad under the Act."

The decision of the U.S. Supreme Court in *Schwabacher* said the ICC has no right to do that. It has no discretionary right to grant an exemption. The exemption comes from Congress. It is in the Interstate Commerce Act and the ICC had no right to leave open the question of additional compensation to shareholders.

The same is true on the other half of their argument, that there is no exemption, as they put it, because they like that word more than "pre-emption"—there is no exemption if the parties waive it, if the railroads are willing to grant appraisal, as Union Pacific indicated to some extent it would not object here.

JUSTICE MOORE: To some extent?

MR. JOSEPH: Indicated it would not object, your Honor.

JUSTICE MOORE: Would not object, flatly.

MR. JOSEPH: Didn't guarantee appraisal rights.

JUSTICE MOORE: I understand, but it flatly wasn't anything to some extent.

MR. JOSEPH: No, your Honor, it indicated—all I meant by that is, it indicated it would not object. It did not say, "We guarantee there will be appraisal rights."

In the *Schwabacher* case the railroads also were willing to have state law proceedings following the ICC approval of the merger. And to that extent if there were an exemption that could be waived, it existed there.

Once again, the Supreme Court said, "This is not something that is within the discretion of either the ICC or the railroads. Congress made this determination."

So, your Honor, what they are doing is relitigating before this Court the *Schwabacher* decision, which they may not do. They may ask this Court to interpret it, as your Honor said, but not to relitigate it, and there is no room for interpretation, if your Honors will read that case.

Some questions were asked about—

JUSTICE MOORE: Then why did we go through all this?

MR. JOSEPH: Sir?

JUSTICE MOORE: How did this all come about? You must have thought there was some basic jurisdictional

problem to have let it go this far, to have made these representations. Good lawyers don't usually just simply say, "Yes, we'll try to confer jurisdiction by consent." There must have been some serious doubt. How did it get this far before your client decided to ring the curtain down on it?

MR. JOSEPH: Well, your Honor, I was not personally involved at that time.

JUSTICE MOORE: I understand.

MR. JOSEPH: I think for reasons that I am not familiar with, the representations were made that were made that, "We will not object to an appraisal proceeding on the basis of *Schwabacher.*" but in the same—

THE CHIEF JUSTICE: But why would your predecessors advising the company say that when *Schwabacher* says, "We think the Commission must pass upon and approve all capital liabilities which the merged company will assume or discharge as a result of the merger"? Why would these companies hold out any hope of a Delaware appraisal if they felt that language must be taken at its face value?

MR. JOSEPH: Your Honor, I cannot tell you what motivation they had. All that I can state is that in connection with the disclosure that they would not object it was made clear twice that in the opinion of counsel there was no appraisal right under *Schwabacher* and that the Chancery Court could on its own initiative determine that it had no jurisdiction. And if your Honors think that the shareholders might not have understood what all that meant, let me tell you what they told the D.C. Circuit. Some questions have been raised as to what we told the D.C. Circuit, or other counsel did.

JUSTICE MOORE: Excuse me. Before you get to that, correct me if I'm mistaken, Mr. Joseph, but did I understand you to say that the stockholders were flat out told that in the opinion of counsel there were no appraisal rights?

MR. JOSEPH: In the opinion of counsel there might be no—there could be or might be.

JUSTICE MOORE: That's what I understood. In the opinion of counsel, dissenting stockholders may not have any appraisal rights. Now, that's far different from saying, "There are no appraisal rights."

So to get back to the Chief Justice's question, why did it get this far if your client is now so adamant in its position?

MR. JOSEPH: When you say why did we get this far—

JUSTICE MOORE: How did it get this far if your client was as adamant in its position then as it is today?

MR. JOSEPH: Well, your Honor, I don't know why the shareholders who dissented chose to dissent. I can tell you that they were not misled. They told the D.C. Circuit as flatly as anyone could state—

JUSTICE MOORE: Where is that in the record?

MR. JOSEPH: This is in their brief to the D.C. Circuit.

JUSTICE MOORE: Where is it in the record?

MR. JOSEPH: We are looking for it, your Honor. I think it is a matter that the Court could take judicial notice of since it is in a court filing.

THE CHIEF JUSTICE: It's not in your initial appendix.

JUSTICE MOORE: In the Delaware Supreme Court case of *Lifman* v. *Aronson* and as even most recently expostulated by this Court in *Ruggles* v. *Riggs* Delaware courts

are not at liberty to take judicial notice of proceedings in other courts just—without the record being proven.

MR. JOSEPH: I withdraw my statement, your Honor.

I will then pass over the point, since we have not yet found it in the record.

I would like to call your Honors' attention to the Model Rules of Professional Conduct, which obviously, as you know, are in effect in this State, and which say in the section entitled "Candor Toward the Tribunal," Rule 3.3 (a)(3), "A lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."

THE CHIEF JUSTICE: That was in effect also at the time it was represented to the stockholders that, "You have a pretty good chance of getting an appraisal. We're not even going to object to it," was it not?

MR. JOSEPH: Well, your Honor is paraphrasing. Obviously we never said, "You have a pretty good chance."

THE CHIEF JUSTICE: Well, whatever was said, we have read it.

MR. JOSEPH: Actually that—

THE CHIEF JUSTICE: Is there not a corresponding duty of candor to stockholders?

MR. JOSEPH: Of course there is, your Honor, and I believe that it was exercised and implemented by the statements made twice, that in the opinion of counsel there might be no appraisal proceeding and that there is no guarantee that there will be any because the Chancery Court may on its own initiative determine that there isn't any.

Your Honor, the plain fact is that however we might debate the meaning of the representations that were made and whether there was any violation—and I believe there was not—in the letter that was sent to the Vice Chancellor informing her of a controlling jurisdictional decision which would have rendered the trial that she was about to commence a nullity, because surely she would have learned about it. It's a landmark case in railroad mergers. And had she not learned about it, this Court would have educated her about it, and there would have been a waste of judicial resources in a trial and appeal.

However you viewed those representations, the plain fact is that they have asserted those equities in their new action in the Federal Court in New York that *Schwabacher* is a jurisdictional decision in which the Supreme Court permits of no appraisal proceedings and, your Honors, we respectfully urge that the Vice Chancellor's decision should be affirmed.

JUSTICE MOORE: It's not cited by the parties, but are you familiar with the doctrine commonly referred to as "the *Schnell* v. *Chris-Craft* doctrine"?

MR. JOSEPH: No, your Honor, I'm not. I'd be glad to be educated.

JUSTICE MOORE: Well, it basically stands for the principle that legal action will not necessarily be sustained where it is inequitable.

MR. JOSEPH: Obviously our response to that, your Honor, is that there was full disclosure in this case to the shareholders, and if you will read the representations made in the proxy statement and the offer to purchase and put them side by side with the letter which counsel sent to Vice Chancellor Berger, I would hope you would come to that conclusion.

Thank you.

THE CHIEF JUSTICE: All right. Thank you.

CERTIFICATE

I, JACK P. WHITE, Official Reporter for the Court of Chancery of the State of Delaware, do hereby certify that the foregoing pages numbered 3 through 42 contain a true and correct transcription of the tape-recorded proceedings as stenographically reported by me in the above stated cause, before the Supreme Court of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF, I have hereunder set my hand at Wilmington this 3rd day of March 1986.

/s/ JACK P. WHITE

Official Reporter for the
Court of Chancery of the
State of Delaware

Typed by:

Anne B. Nolan

APPENDIX F

TRANSCRIPT OF PROCEEDINGS

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 82-2253, et al.

SOUTHERN PACIFIC TRANSPORTATION CO., et al.,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA,
Respondents.

Washington, D.C.
June 6, 1983

Pages 1 thru 6

MILLER REPORTING COMPANY, INC.
507 C Street, N.E.
Washington, D.C. 20002
546-6666

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos 82-2253, et al.

SOUTHERN PACIFIC TRANSPORTATION CO., et al.,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and the
UNITED STATES OF AMERICA,
Respondents.

Monday, June 6, 1983
Washington, D. C.

The above-entitled matter came on for oral argument, pursuant to notice, at 9:30 a.m.

BEFORE:

CIRCUIT JUDGES WRIGHT, MIKVA, and BORK.

APPEARANCES:

JOSEPH AUERBACH, ESQ., Sullivan & Worcester, One Post Office Square, Boston, Massachusetts 02109; on behalf of Petitioner, Kansas City Southern Railway.

RICHARD L. DASHEFSKY, ESQ., Gibson, Dunn & Crutcher, 1776 G Street, N. W., Washington, D. C. 20006; on behalf of Petitioner, Southern Pacific Transportation Company.

DENNIS W. WILSON, ESQ., 80 East Jackson Boulevard, Chicago, Illinois 60604; on behalf of Petitioner, Atchison, Topeka & Santa Fe Railway.

JOHN H. CALDWELL, ESQ., Hamel, Park, McCabe & Saunders, 888 Sixteenth Street, N. W., Washington, D. C. 20006; on behalf of Petitioner, Denver and Rio Grande Western Railroad Company.

JOHN O'B. CLARKE, JR., ESQ., Highsaw & Mahoney, 1050 17th Street, N. W., Washington, D. C. 20036; on behalf of Petitioner, Brotherhood of Maintenance of Way Employees.

RICHARD H. STREETER, ESQ., Wheeler & Wheeler, 1729 H Street, N. W., Washington, D. C. 20006; on behalf of Petitioner, Edward K. Wheeler.

HENRI F. RUSH, ESQ., Associate General Counsel, Interstate Commerce Commission, Washington, D. C. 20423; on behalf of Respondent, Interstate Commerce Commission.

NANCY GARRISON, ESQ., Antitrust Division, Department of Justice, Washington, D. C. 20530; on behalf of Respondents, United States of America.

CHARLES A MILLER, ESQ., Covington & Burling, 1201 Pennsylvania Avenue, N. W., Washington, D. C. 20044; on behalf of Intervenors.

ORAL ARGUMENT OF CHARLES A. MILLER, ESQ. ON BEHALF OF INTERVENORS

MR. MILLER (continuing): I want to advise the Court that, pursuant to the ICC's order of approval, the second phase of the Western Pacific transaction occurred. A meeting of the shareholders was held late last month pursuant to notice and a proxy statement and the stockholders voted in favor of the merger which has been accomplished.

There were a number of stockholders, including Mr. Wheeler, who is the party before the Court today, who dissented from the sale and have claimed the right to appraisal of the value of their stock under Delaware law, a right which the Union Pacific has allowed the shareholders to assert although it need not have done so.

At this point the stockholders are no longer stockholders of Western Pacific.

QUESTION: Need not have done so, that appraisal right wasn't determined by the Commission, was it?

MR. MILLER: No, it was determined by contract by Union Pacific, because but for the contract there would have been a *Schwabacher* doctrine which would have said no state law. We did that by contract when we made the deal.

But these dissenting stockholders are no longer stockholders. They are now creditors of the company in an amount to be determined by the Delaware court. In these circumstances, I would like to suggest that there is no real purpose to be served by any further ICC role in this particular transaction. These minority stockholders are not seeking to overturn the mergers. They are simply seeking to get a higher price for their stock. A forum exists in Delaware to resolve that question and that is going to go

forward, whatever happens at the ICC or in this appeal.

QUESTION: At least it is the intention of the company, it is not the intention of the company to assert in the Delaware court the defense of the appraisal right, this is a matter that has been determined by the ICC at a value of $20?

MR. MILLER: Not in the way you said it, Your Honor, although if there is an appraisal case I am sure we will cite to the ICC and rely upon it, but we have had—

QUESTION: It is probably a little bit of a Catch 22 situation?

MR. MILLER: Oh, no, there is a big difference. There is an awfully big difference. The fact that the ICC was right is not a reason not to show it to the Court in Delaware. But we have not asserted a *Schwabacher* defense to the case, and if Delaware court disagrees, it disagrees.

The Delaware court can decide that the price is $20 or higher or lower. Whatever they decide will be the amount that is paid to the minority stockholders. All I am suggesting here is there isn't much reason at this point in transportation regulation for this issue to be concerning the ICC.

(End of excerpt requested)

APPENDIX G

Title 49, U.S.C.:

§ 11341. Scope of authority

(a) The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation participating in or resulting from a transaction approved by or exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. However, if a purchase and sale, a lease, or a corporate consolidation or merger is involved in the transaction, the carrier or corporation may carry out the transaction only with the assent of a majority, or the number required under applicable State law, of the votes of the holders of the capital stock of that corporation entitled to vote. The vote must occur at a regular meeting, or special meeting called for that purpose, of those stockholders and the notice of the meeting must indicate its purpose.

(b) A power granted under this subchapter to a carrier or corporation is in addition to and changes its powers under its corporate charter and under State law. Action under this subchapter does not establish or provide for establishing a corporation under the laws of the United States.

APPENDIX H

Title 8, Delaware Code:

§ 262. Appraisal rights.

(a) Any stockholder of a corporation of this State who has complied with subsection (d) of this section and has neither voted in favor of the merger or consolidation nor consented thereto in writing pursuant to § 228 of this title shall be entitled to an appraisal by the Court of Chancery of the fair value of his shares of stock under the circumstances described in subsections (b) and (c) of this section. As used in this section, the word "stockholder" means a holder of record of stock in a stock corporation and also a member of record of a nonstock corporation; the words "stock" and "share" mean and include what is ordinarily meant by those words and also membership or membership interest of a member of a nonstock corporation.

(b) Appraisal rights shall be available for the shares of any class or series of stock of a constituent corporation in a merger to be effected pursuant to § 251, 252, 254, 257 or 258 of this title:

(1) Provided, however, that no appraisal rights under this section shall be available for the shares of any class or series of stock which, at the record date fixed to determine the stockholders entitled to receive notice of and to vote at the meeting of stockholders to act upon the agreement of merger or consolidation, were either (i) listed on a national securities exchange or (ii) held of record by more than 2,000 stockholders; and

further provided that no appraisal rights shall be available for any shares of stock of the constituent corporation surviving a merger if the merger did not require for its approval the vote of the stockholders of the surviving corporation as provided in subsection (f) of § 251 of this title.

(2) Notwithstanding paragraph (1) of this subsection, appraisal rights under this section shall be available for the shares of any class or series of stock of a constituent corporation if the holders thereof are required by the terms of an agreement of merger or consolidation pursuant to §§ 251, 252, 254, 257 and 258 of this title to accept for such stock anything except:

a. Shares of stock of the corporation surviving or resulting from such merger or consolidation;

b. Shares of stock of any other corporation which at the effective date of the merger or consolidation will be either listed on a national securities exchange or held of record by more than 2,000 stockholders;

c. Cash in lieu of fractional shares of the corporations described in the foregoing subparagraphs a. and b. of this paragraph; or

d. Any combination of the shares of stock and cash in lieu of fractional shares described in the foregoing subparagraphs a., b. and c. of this paragraph.

(3) In the event all of the stock of a subsidiary Delaware corporation party to a merger effected under § 253 of this title is not owned by the parent corporation immediately prior to the merger, appraisal rights shall be available for the shares of the subsidiary Delaware corporation.

(c) Any corporation may provide in its certificate of incorporation that appraisal rights under this section shall be available for the shares of any class or series of its stock as a result of an amendment to its certificate of incorporation, any merger or consolidation in which the corporation is a constituent corporation or the sale of all or substantially all of the assets of the corporation. If the certificate of incorporation contains such a provision, the procedures of this section, including those set forth in subsections (d) and (e) of this section, shall apply as nearly as is practicable.

(d) Appraisal rights shall be perfected as follows:

(1) If a proposed merger or consolidation for which appraisal rights are provided under this section is to be submitted for approval at a meeting of stockholders, the corporation, not less than 20 days prior to the meeting, shall notify each of its stockholders entitled to such appraisal rights that appraisal rights are available for any or all of the shares of the constituent corporations, and shall include in such notice a copy of this section. Each stockholder electing to demand the appraisal of his shares shall deliver to the corporation, before the taking of the vote on the merger or consolidation, a written demand for appraisal of his shares. Such demand will be sufficient if it reasonably informs the corporation of the identity of the stockholder and that the stockholder intends thereby to demand the appraisal of his shares. A proxy or vote against the merger or consolidation shall not constitute such a demand. A stockholder electing to take such action must do so by a separate written demand as herein provided. Within 10 days after the effective date of such merger or consolidation, the surviving or resulting corporation

shall notify each stockholder of each constituent corporation who has complied with this subsection and has not voted in favor of or consented to the merger or consolidation of the date that the merger or consolidation has become effective; or

(2) If the merger or consolidation was approved pursuant to § 228 or 253 of this title, the surviving or resulting corporation, either before the effective date of the merger or consolidation or within 10 days thereafter, shall notify each of the stockholders entitled to appraisal rights of the effective date of the merger or consolidation and that appraisal rights are available for any or all of the shares of the constituent corporation, and shall include in such notice a copy of this section. The notice shall be sent by certified or registered mail, return receipt requested, addressed to the stockholder at his address as it appears on the records of the corporation. Any stockholder entitled to appraisal rights may, within 20 days after the date of mailing of the notice, demand in writing from the surviving or resulting corporation the appraisal of his shares. Such demand will be sufficient if it reasonably informs the corporation of the identity of the stockholder and that the stockholder intends to demand the appraisal of his shares.

(e) Within 120 days after the effective date of the merger or consolidation, the surviving or resulting corporation or any stockholder who has complied with subsections (a) and (d) hereof and who is otherwise entitled to appraisal rights, may file a petition in the Court of Chancery demanding a determination of the value of the stock of all such stockholders. Notwithstanding the foregoing, at any time within 60 days after the effective date of the

merger or consolidation, any stockholder shall have the right to withdraw his demand for appraisal and to accept the terms offered upon the merger or consolidation. Within 120 days after the effective date of the merger or consolidation, any stockholder who has complied with the requirements of subsections (a) and (d) hereof, upon written request, shall be entitled to receive from the corporation surviving the merger or resulting from the consolidation a statement setting forth the aggregate number of shares not voted in favor of the merger or consolidation and with respect to which demands for appraisal have been received and the aggregate number of holders of such shares. Such written statement shall be mailed to the stockholder within 10 days after his written request for such a statement is received by the surviving or resulting corporation or within 10 days after expiration of the period for delivery of demands for appraisal under subsection (d) hereof, whichever is later.

(f) Upon the filing of any such petition by a stockholder, service of a copy thereof shall be made upon the surviving or resulting corporation, which shall within 20 days after such service file in the office of the Register in Chancery in which the petition was filed a duly verified list containing the names and addresses of all stockholders who have demanded payment for their shares and with whom agreements as to the value of their shares have not been reached by the surviving or resulting corporation. If the petition shall be filed by the surviving or resulting corporation, the petition shall be accompanied by such a duly verified list. The Register in Chancery, if so ordered by the Court, shall give notice of the time and place fixed for the hearing of

such petition by registered or certified mail to the surviving or resulting corporation and to the stockholders shown on the list at the addresses therein stated. Such notice shall also be given by 1 or more publications at least 1 week before the day of the hearing, in a newspaper of general circulation published in the City of Wilmington, Delaware or such publication as the Court deems advisable. The forms of the notices by mail and by publication shall be approved by the Court, and the costs thereof shall be borne by the surviving or resulting corporation.

(g) At the hearing on such petition, the Court shall determine the stockholders who have complied with this section and who have become entitled to appraisal rights. The Court may require the stockholders who have demanded an appraisal for their shares and who hold stock represented by certificates to submit their certificates of stock to the Register in Chancery for notation thereon of the pendency of the appraisal proceedings; and if any stockholder fails to comply with such direction, the Court may dismiss the proceedings as to such stockholder.

(h) After determining the stockholders entitled to an appraisal, the Court shall appraise the shares, determining their fair value exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation, together with a fair rate of interest, if any, to be paid upon the amount determined to be the fair value. In determining such fair value, the Court shall take into account all relevant factors. In determining the fair rate of interest, the Court may consider all relevant factors, including the rate of interest which the surviving or resulting

corporation would have had to pay to borrow money during the pendency of the proceeding. Upon application by the surviving or resulting corporation or by any stockholder entitled to participate in the appraisal proceeding, the Court may, in its discretion, permit discovery or other pretrial proceedings and may proceed to trial upon the appraisal prior to the final determination of the stockholder entitled to an appraisal. Any stockholder whose name appears on the list filed by the surviving or resulting corporation pursuant to subsection (f) of this section and who has submitted his certificates of stock to the Register in Chancery, if such is required, may participate fully in all proceedings until it is finally determined that he is not entitled to appraisal rights under this section.

(i) The Court shall direct the payment of the fair value of the shares, together with interest, if any, by the surviving or resulting corporation to the stockholders entitled thereto. Payment shall be so made to each such stockholder, in the case of holders of uncertified stock forthwith, and in the case of holders of shares represented by certificates upon the surrender to the corporation of the certificates representing such stock. The Court's decree may be enforced as other decrees in the Court of Chancery may be enforced, whether such surviving or resulting corporation be a corporation of this State or of any state.

(j) The costs of the proceeding may be determined by the Court and taxed upon the parties as the Court deems equitable in the circumstances. Upon application of a stockholder, the Court may order all or a portion of the expenses incurred by any stockholder in connection with the appraisal proceeding, including, without limitation,

reasonable attorney's fees and the fees and expenses of experts, to be charged pro rata against the value of all the shares entitled to an appraisal.

(k) From and after the effective date of the merger or consolidation, no stockholder who has demanded his appraisal rights as provided in subsection (d) of this section shall be entitled to vote such stock for any purpose or to receive payment of dividends or other distributions on the stock (except dividends or other distributions payable to stockholders of record at a date which is prior to the effective date of the merger or consolidation); provided, however, that if no petition for an appraisal shall be filed within the time provided in subsection (e) of this section, or if such stockholder shall deliver to the surviving or resulting corporation a written withdrawal of his demand for an appraisal and an acceptance of the merger or consolidation, either within 60 days after the effective date of the merger or consolidation as provided in subsection (e) of this section or thereafter with the written approval of the corporation, then the right of such stockholder to an appraisal shall cease. Notwithstanding the foregoing, no appraisal proceeding in the Court of Chancery shall be dismissed as to any stockholder without the approval of the Court, and such approval may be conditioned upon such terms as the Court deems just.

(l) The shares of the surviving or resulting corporation to which the shares of such objecting stockholders would have been converted had they assented to the merger or consolidation shall have the status of authorized and unissued shares of the surviving or resulting corporation.

APPENDIX I

No. 85-792

In the Supreme Court of the United States

OCTOBER TERM, 1985

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND UNITED TRANSPORTATION UNION, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT S. BURK
General Counsel
HENRI F. RUSH
Deputy General Counsel
SIDNEY L. STRICKLAND, JR.
Attorney
Interstate Commerce Commission
Washington, D.C. 20423
(202) 275-1851

QUESTION PRESENTED

Whether the majority of the panel of the court below has improperly superimposed a findings requirement not contemplated by Congress upon the exemption from all other laws afforded by 49 U.S.C. § 11341(a) to consolidations approved by the Interstate Commerce Commission under 49 U.S.C. § 11344 by requiring the Commission to anticipate and enumerate at the time of its approval all legal obstacles being waived in order for the statutory exemption to be effective against a subsequent challenge.

No. 85-793

IN THE

Supreme Court of the United States

October Term, 1985

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND
UNITED TRANSPORTATION UNION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Joseph L. Manson, III
(Counsel of Record)
Ronald B. Natalie
Verner, Liipfert, Bernhard
McPherson & Hand, Chartered
Suite 1000
1660 L Street, N.W.
Washington, D.C. 20036
(202) 775-1088

Michael E. Roper
701 Commerce Street
Dallas, Texas 75202
(214) 651-6741

Date: November 7, 1985

QUESTION PRESENTED

Whether the Interstate Commerce Commission, when approving a transaction pursuant to 49 U.S.C. §§11343 and 11344, is required to make specific findings of necessity pursuant to 49 U.S.C. §11341(a) in order to exempt the carriers participating in the approved transaction from the requirements of the Railway Labor Act (45 U.S.C. §§151-160(1982))?

Supreme Court, U.S.
FILED
JUN 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1957

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DANIEL A. BRUNO and PHILIP R. HERZIG,

Petitioners,

—against—

WESTERN PACIFIC RAILROAD COMPANY
and UNION PACIFIC CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

RESPONDENTS' BRIEF IN OPPOSITION

R. FRANKLIN BALOTTI
RICHARDS, LAYTON & FINGER
One Rodney Square
P.O. Box 551
Wilmington, Delaware 19899
(302) 658-6541

LEONARD JOSEPH
(Counsel of Record)
DEWEY, BALLANTINE, BUSHBY,
PALMER & WOOD
140 Broadway
New York, New York 10005
(212) 820-1100

Counsel For Respondents

Question Presented

Whether the Delaware Supreme Court correctly determined, in reliance upon the Interstate Commerce Act and the decision in *Schwabacher v. United States*, 334 U.S. 182 (1948), that approval by the Interstate Commerce Commission of the terms of a railroad merger as just and reasonable preempts appraisal rights under Delaware law and deprives Delaware courts of subject matter jurisdiction over an appraisal proceeding to determine the "fair value" of the stock of one of the railroads?

Parties

The named parties to the proceeding below are listed in the caption.[1]

1 A listing, pursuant to Rule 28.1, of all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of respondents is provided in Appendix E, at 11a.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1957

DANIEL A. BRUNO and PHILIP R. HERZIG,

Petitioners,

—against—

WESTERN PACIFIC RAILROAD COMPANY
and UNION PACIFIC CORPORATION,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

The Western Pacific Railroad Company ("Western Pacific") and Union Pacific Corporation ("Union Pacific") submit this response to the petition for a writ of certiorari to review an order of the Delaware Supreme Court affirming the dismissal, for lack of subject matter jurisdiction, of petitioners' appraisal proceeding under Delaware law seeking the "fair value" of their former holdings of Western Pacific stock. The Delaware Supreme Court, affirming the Delaware Chancery Court and relying on this Court's holding in *Schwabacher v. United States*, 334 U.S. 182 (1948), held that the Interstate Commerce Commission's approval of the merger of Western Pacific into a Union Pacific subsidiary and its determination pursuant to the requirements of the Interstate Commerce Act that the merger terms and merger price were just and reasonable resulted in preemption of any state law appraisal proceeding.

Despite a variety of irrelevant arguments and accusations by petitioners, it is clear that *Schwabacher* disposes of this case

and, accordingly, that the decision below correctly held that the ICC's approval of the merger terms necessarily preempted state law appraisal rights and precluded jurisdiction of the Chancery Court over the appraisal proceeding.

Opinions Below

The unpublished Order of the Delaware Supreme Court is set forth as Appendix A to the Petition. The Opinion of the Delaware Chancery Court is reported at 498 A.2d 171 (Del. Ch. 1985) and is set forth as Appendix B to the Petition. The unpublished Order of the Chancery Court is set forth as Appendix C to the Petition.

Jurisdiction

The Order of the Supreme Court of Delaware was rendered on March 7, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Statutes Involved

The statutory provisions involved in this case are the Interstate Commerce Act, 49 U.S.C. §§ 11341, 11344, and the Delaware appraisal statute, Del. Code Ann. tit. 8, § 262. Section 11341 of the Interstate Commerce Act and section 262 of the Delaware corporations code are set forth as Appendices G and H to the Petition. The pertinent text of section 11344 is set forth as Appendix A, at 1a to 2a, to this Brief.

Statement of the Case

Petitioners' statement of the case is devoted in large measure to strident assertions that respondents breached an agreement not to object to a Delaware appraisal proceeding, thereby waiving the preemptive effect of the ICC's determination.

While respondents breached no agreement, the question of a breach is irrelevant to the jurisdictional issue.[2] The Interstate Commerce Act, as construed in *Schwabacher*, effectuates a preemption over state law appraisal rights and, as petitioners themselves conceded below (App. D at 10a), subject matter jurisdiction cannot be conferred upon state courts by action of the parties.

On January 23, 1980, Union Pacific (through a wholly owned subsidiary) commenced a non-hostile tender offer for shares of Western Pacific common stock at $20 per share in cash. The tender offer was made pursuant to a merger agreement between Western Pacific and Union Pacific. Western Pacific's board of directors recommended that stockholders accept the offer because the directors regarded the $20 per share price as fair.

The Offer to Purchase stated that its purpose was to acquire all of the Western Pacific shares and to merge the railroads, and noted the need for Interstate Commerce Commission approval. The Offer to Purchase advised of the possibility of federal preemption of dissenting stockholders' state appraisal rights pursuant to *Schwabacher*, and of Union Pacific's agreement not to object if shareholders demanded appraisal (Pet. at 5). A large majority of the outstanding shares of Western Pacific Class A common stock were tendered to Union Pacific and were transferred to a voting trust pending the ICC's determination of the applications for approval of the proposed merger.

Various minority shareholders of Western Pacific, including one of the named petitioners in this action, Daniel A. Bruno,

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2 Petitioners have commenced a related case in the U.S. District Court for the Southern District of New York making claims under both federal and state law for damages they allegedly incurred (apparently consisting of legal expenses plus interest on the $20 per share that they have delayed taking in order to pursue appraisal rights) due to the purported breach of respondents' agreement not to object to an appraisal proceeding, and they have moved for partial summary judgment on their breach of contract claim. *Bruno v. Cook*, 85 Civ. 0835 (S.D.N.Y. Jan. 28, 1986).

intervened in the ICC proceeding. They called to the attention of the ICC, and subsequently to the appellate courts, the issues concerning the value of Western Pacific stock that they later sought to litigate in their Delaware appraisal action, including their position that the merger price did not adequately reflect the value of Western Pacific real estate holdings. *Union Pacific Corp.*, 366 I.C.C. 459, 634 (1982), *aff'd sub nom.*, *Southern Pacific Transportation Co. v. ICC*, 736 F.2d 708 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1171, 1172 (1985).

On October 20, 1982, the ICC approved the merger. The ICC expressly recognized its responsibilities under *Schwabacher*, noting that "it is incumbent upon us to see that the interests of the minority stockholders are protected and that the overall proposal is just and reasonable to those stockholders, *Schwabacher v. United States*, 334 U.S. at 198, 201." *Union Pacific*, 366 I.C.C. at 635. After analyzing the facts, considering the arguments raised by dissenting minority shareholders, and discussing methods for valuing stock in an ongoing concern and the value of Western Pacific's real estate, the ICC concluded that "the terms of the UPRR-WPRR transaction are just and reasonable" and that the $20 per share price "is fair and reasonable." *Id.* at 632-638. The ICC's decision was affirmed on appeal and this Court denied petitions for a writ of certiorari. *Southern Pacific Transportation Co. v. ICC*, 736 F.2d 708 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1171 (1985).[3]

On May 2, 1983, a Proxy Statement was circulated to Western Pacific shareholders in connection with a meeting of shareholders to act on the merger. The Proxy Statement again advised of the preemptive effect of the ICC's determination on state appraisal proceedings. It also again advised that Union Pacific had agreed not to object if shareholders sought an

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3 In affirming the ICC, the Court of Appeals in no way relied on the existence of appraisal rights but rather affirmed the ICC's determination that the merger price was just and reasonable, including the ICC's methodology in valuing Western Pacific's real estate holdings. *Southern Pacific*, 736 F.2d at 726.

appraisal proceeding, but cautioned that a Delaware court could nevertheless determine on its own initiative that it lacked jurisdiction as a result of *Schwabacher.* The Proxy Statement advised:

> In *Schwabacher v. United States*, 334 U.S. 182 (1948), the United States Supreme Court, in construing the predecessors to Sections 11344 and 11346 of the Interstate Commerce Act, held that appraisal rights otherwise granted by state law are preempted in the case of acquisitions approved as just and reasonable by the ICC in accordance with applicable Federal law. Nevertheless, Union Pacific has agreed that it will not object if holders of Class A Common Stock not owned by Union Pacific or its affiliates demand appraisal of their Class A Common Stock under Delaware law. However, there can be no assurance that a Delaware court will not, on its own initiative, determine that *Schwabacher* denies it jurisdiction over an appraisal proceeding commenced in connection with the Merger in which case each dissenting shareholder shall receive $20 per share in accordance with the Agreement of Merger. In any such proceeding, Union Pacific would have the right to argue that the determination of the ICC that the terms of the Merger providing for the conversion of each share of Class A Common Stock into $20 in cash is just and reasonable should be given substantial weight by the Delaware courts.

May 2, 1983 Proxy Statement at 5.[4] On May 24, 1983, the stockholders meeting was held and the merger was approved.

After issuance of the Proxy Statement, Mr. Bruno, one of the petitioners here, petitioned the ICC to reopen and reconsider its approval of the merger terms, based on the information as to land values included in the Proxy Statement (*see*

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4 Petitioners' quotation of this portion of the Proxy Statement (Pet. at 10-11) eliminates the last two sentences of this paragraph, which expressly alerted dissenting shareholders that the Delaware courts might dismiss an appraisal proceeding.

App. B at 3a-4a).[5] The ICC denied the petition, ruling that the new land value allegations were not materially different from the allegations made prior to the ICC's original decision (App. B at 4a). Shortly after the ICC denied the petition to reopen, petitioners commenced the appraisal proceeding below.

In March, 1985 it became apparent that petitioners were not going to advise the Delaware Chancery Court of the jurisdictional provisions of the Interstate Commerce Act or of the holding of *Schwabacher* so that the court could be made aware of an issue of subject matter jurisdiction. Accordingly, counsel for respondents wrote a letter to the Chancery Court enclosing the relevant portion of the 1983 Proxy Statement and calling the court's attention to Union Pacific's position respecting the applicability of *Schwabacher* set forth in the Proxy Statement, informing the court of Union Pacific's agreement not to object to prosecution of the appraisal action on the basis of *Schwabacher*, and reaffirming that Union Pacific would not raise any such objection (App. C at 5a-6a). The Chancery Court directed the parties to brief the question of its jurisdiction (Pet. App. at A6). On August 9, 1985, the Chancery Court issued an opinion dismissing the appraisal proceeding for lack of subject matter jurisdiction (Pet. App. B). The Delaware Supreme Court affirmed on March 7, 1986 (Pet. App. A).

Union Pacific did not assert a jurisdictional defense in its answer to the petition in the appraisal proceeding or move to dismiss on jurisdictional grounds. Its counsel brought to the attention of the Chancery Court, pursuant to the obligation to inform the court of relevant authority, the existence of the agreement not to object to jurisdiction on the basis of a

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5 The information as to land values contained in the Proxy Statement was also brought to the attention of the D.C. Circuit during the appeal of the original ICC decision. Supplemental Brief of Petitioner Edward K. Wheeler at 2-4, May 27, 1983, *Wheeler v. ICC*, No. 82-2342 (D.C. Cir. 1983). That court thereafter affirmed the ICC's finding that the merger price was just and reasonable, *Southern Pacific Transportation Co.*, 736 F.2d at 726, and this court denied certiorari, 105 S. Ct. 1172 (1985).

decision of this Court which, if overlooked, could have made the appraisal trial a nullity and a waste of judicial resources. Notwithstanding the absence of any jurisdictional motion the Chancery Court decided to consider the jurisdictional issue and decided it adversely to petitioners. The Delaware Supreme Court affirmed. Petitioners took full advantage of the opportunity to argue in the Delaware courts, as they now argue here, that the Interstate Commerce Act and *Schwabacher* did not confer exclusive jurisdiction on the ICC in this case. Thus the only issue here is whether the Delaware courts properly determined that petitioners' arguments were without merit and that appraisal jurisdiction was lacking.

REASONS FOR DENYING THE PETITION

Petitioners' mistaken accusations of misrepresentations by respondents do not suffice to create subject matter jurisdiction in the Delaware courts over the appraisal proceeding below in the face of the provisions of the Interstate Commerce Act conferring exclusive jurisdiction on the ICC to determine whether the terms of a merger of interstate railroads are just and reasonable, the long-standing decision of this Court in *Schwabacher* confirming the preemptive effect of such ICC determinations on state law proceedings, and the refusal by Congress to overrule *Schwabacher* notwithstanding subsequent recodification of the relevant provisions of the Act. *See Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 54 U.S.L.W. 4520, 4523 (U.S. May 27, 1986). The decision of the Delaware Supreme Court was correct, and petitioners have shown no meritorious basis for the grant of certiorari.

Petitioners invoke several traditional grounds in support of their request for review—that the decision below decided an important issue incorrectly and in conflict with decisions of other courts, and that the Court recently granted certiorari in a case "raising virtually the identical issue." However, petitioners misstate the law and misconstrue other cases in their efforts to demonstrate that these grounds exist in this case. The decision

below faithfully follows this Court's decision in *Schwabacher* and is harmonious with the relevant lower court cases since *Schwabacher* was decided. Moreover, the allegedly identical case pending before the Court, *Brotherhood of Locomotive Engineers v. ICC*, 761 F.2d 714 (D.C. Cir. 1985), *cert. granted*, 54 U.S.L.W. 3630 (U.S. March 24, 1986) (Nos. 85-792, 85-793), presents a different issue.

1. The Court Below Correctly Held That This Court's Decision In *Schwabacher* Requires ICC Preemption Of State Proceedings Involving Shareholder Rights

The Court held in *Schwabacher v. United States*, 334 U.S. 182 (1948), that state proceedings to allow additional shareholder compensation are preempted in the case of mergers—such as the merger of Western Pacific and Union Pacific—approved as just and reasonable by the ICC in accordance with the Interstate Commerce Act. In such matters, the Court stated, "The jurisdiction of the [ICC] . . . is made plenary and exclusive and independent of all other state or federal authority." 334 U.S. at 197.

Schwabacher involved an ICC order approving the terms of a railroad merger as just and reasonable but expressly leaving open the issue of the dissenting stockholders' rights to additional compensation under state law, to be resolved through agreement of the parties or litigation under state law. The Court reversed the ICC's determination that the stockholders' state law claims could survive, concluding that:

> It appears to us inconsistent with the Interstate Commerce Act for the Commission to leave claims growing out of the capital structure of one of the constituent companies to be added to the obligations of the surviving carrier, contingent upon the decision of some other tribunal or agreement of the parties themselves.

334 U.S. at 197.

The essence of petitioners' arguments is that *Schwabacher* is wrong, not that *Schwabacher* does not control this case. Yet,

petitioners offer no grounds for challenging the soundness of the holding in *Schwabacher*, and none exists. *Schwabacher* has been the landmark decision governing the effect of ICC-approved mergers on shareholders' rights for almost 40 years. During that period, although obviously aware of the decision, Congress recodified the pertinent provisions of the Interstate Commerce Act (now 49 U.S.C. §§ 11341, 11344, formerly 49 U.S.C. § 5(2), (11)) but declined to overrule *Schwabacher* or to make any substantive changes in the relevant statutory provisions, a fact petitioners expressly conceded during the briefing below.[6] Such action by Congress is evidence of its approval of this Court's construction of the Act. *Cf. Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 54 U.S.L.W. 4520, 4523 (U.S. May 27, 1986) (even if a decision of the Court represented unwise policy, it "remains true that Congress must be presumed to have been fully cognizant of [the decision's] interpretation of the statutory scheme . . . and that Congress did not see fit to change it when Congress carefully reexamined this area of the law . . ."); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-82 (1982).

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6 Congress expressly provided when it enacted the recodification in 1978 that the recodification "may not be construed as making a substantive change in the laws replaced." Pub. L. No. 95-473, § 3(a), 92 Stat. 1337, 1466 (1978). The 1978 Revision Notes explain the drafting reasons for certain nonsubstantive changes in language. First, former § 5(11) of the Interstate Commerce Act provided that the ICC's authority was "exclusive and plenary" and that the merging entities were "relieved from the operation of the antitrust laws and all other restraints, limitations, and prohibitions of law . . . ," while the recodified § 11341(a) provides that the ICC's jurisdiction is "exclusive" and that the merging entities are "exempt" from antitrust and all other laws. According to the Revision Notes, these changes were made "for clarity." 49 U.S.C.A. § 11341, Historical and Revision Notes at 533 (1986). Second, former § 5(2)(b) of the Act provided for ICC approval of a merger "upon the terms and conditions . . . found to be just and reasonable . . . ," while the recodified § 11344(c) provides that the ICC shall approve a transaction "when it finds the transaction is consistent with the public interest." The Revision Notes explain that the words "just and reasonable" were omitted in the recodification "for clarity" and in view of the requirement that the transaction be "consistent with the public interest." 49 U.S.C.A. § 11344, Historical and Revision Notes at 544 (1986).

Although the court below found the holding in *Schwabacher* to be controlling here, petitioners address the case primarily by ignoring it. They devote page after page of legal argument to their own interpretation of the Interstate Commerce Act and to two cases that have nothing to do with the effect of the ICC's approval of a merger upon shareholders' rights. Their own interpretation of the Act is that it created a mere exemption from state law that exists only if specifically invoked by the ICC as necessary to carry out the merger. They assert further that the exemption can be waived by the parties, and that it was waived by Union Pacific's agreement not to object to appraisal jurisdiction. Petitioners' efforts thus to avoid *Schwabacher* were correctly rejected by the Delaware Supreme Court as having "no merit" (Pet. App. at A2).

First, *Schwabacher* contradicts petitioners' reading of the Interstate Commerce Act as creating an exemption that only comes into effect if the ICC specifically determines that such an exemption is necessary. It is clear from *Schwabacher* that the statutory exemption follows perforce from the ICC's approval of the merger terms without the need for specific ICC findings of necessity. Indeed, in *Schwabacher* the ICC had not only failed to invoke an exemption as necessary to carry out the merger, but it had expressly found that allowing dissenting stockholders to pursue state law remedies would *not* impair the railroad's performance—in effect concluding that an exemption was *not* necessary. 334 U.S. at 197. Under petitioners' interpretation of the Act, shareholders' state law rights would therefore have survived. Nonetheless, the Court held that preemption resulted from the Act itself, notwithstanding the ICC's contrary intent, and that it would be "inconsistent with the Interstate Commerce Act" to allow the dissenting stockholders' claims to survive. *Id.*

Petitioners erroneously and without citation claim that the ICC here approved, as part of the merger terms, an "agreement to afford" appraisal rights to minority shareholders (Pet. at 6). In addition to the fact that respondents did not agree "to afford" appraisal rights, nowhere in the ICC's extensive opin-

ion does it approve or even refer to any such agreement. To the contrary, the ICC expressly recognized that "it is incumbent upon us to see that the interests of the minority stockholders are protected and that the overall proposal is just and reasonable to those stockholders, *Schwabacher v. United States*, 334 U.S. at 198, 201." *Union Pacific*, 336 I.C.C. at 635. The ICC's adherence here to *Schwabacher*, in which the ICC was reversed for allowing minority shareholders' state law rights to survive, further indicates that the ICC did not purport to approve the availability of appraisal rights here.

Second, as to petitioners' argument that the statutory preemption can be waived by the parties, in *Schwabacher* the ICC was willing, and the railroads agreed, to allow dissenting shareholders to prosecute a state appraisal proceeding, thus waiving federal preemption if it was waivable. Indeed, in the merger agreement and before the ICC in that case the surviving railroad actually offered dissenting shareholders appraisal rights under Virginia law because the Michigan statute that permitted the merger at issue did not appear to give such appraisal rights to such dissenters. *Pere Marquette Railway Co. Merger*, 267 I.C.C. 207, 215-16, 247 (1947). Nonetheless, this Court reversed the ICC and, as noted above, held that the Interstate Commerce Act made satisfaction of the claims of dissenting stockholders a matter within the plenary and exclusive jurisdiction of the ICC. *Schwabacher*, 334 U.S. at 197-98.

Judicial decisions after *Schwabacher* have confirmed the plenary and exclusive jurisdiction of the ICC in connection with railroad mergers. In *Altman v. Central of Georgia Railway Co.*, 488 F.2d 1302 (D.C. Cir. 1973), the court followed *Schwabacher* and affirmed the dismissal of a state-law action to compel the payment of dividends on preferred stock. While the plaintiff's action was pending, the ICC had approved a railroad consolidation involving the defendant and had ruled that the preferred shareholders were paid the "just and reasonable" value of their stock. Relying upon *Schwabacher*, the court held that plaintiff's "claim of right to additional dividends derives solely from state law, and it does not survive the

final order of the Commission approving the consolidation. . . ." *Id.* at 1305.

Other courts have reached the same conclusion in similar cases. *Suffin v. Pennsylvania Railroad Co.*, 276 F. Supp. 549 (D. Del. 1967), *aff'd*, 396 F.2d 75 (3d Cir. 1968), *cert. denied*, 393 U.S. 1062 (1969); *see also Fried v. United States*, 212 F. Supp. 886 (S.D.N.Y. 1963); *Stott v. United States*, 166 F. Supp. 851 (S.D.N.Y. 1958); *Tsimenis v. New York Central Railroad Co.*, 34 A.D.2d 531, 309 N.Y.S.2d 22 (N.Y. App. Div. 1970).

2. The Allegedly Conflicting Decisions, Including The One Already Before This Court, Do Not Relate To ICC Determinations Concerning Shareholder Rights And Are Not Inconsistent With The Decision Below

Petitioners also claim that certiorari is appropriate on the ground that the decision of the Delaware Supreme Court is in conflict with decisions of the Courts of Appeals for the Fifth Circuit and the District of Columbia Circuit, one of which is already before this Court on certiorari. *See Brotherhood of Locomotive Engineers v. ICC*, 761 F.2d 714 (D.C. Cir. 1985), *cert. granted*, 54 U.S.L.W. 3630 (U.S. March 24, 1986) (Nos. 85-792, 85-793); *City of Palestine v. United States*, 559 F.2d 408 (5th Cir. 1977), *cert. denied*, 435 U.S. 950 (1978). In fact, those cases have nothing to do with dissenting stockholders' rights to additional compensation after an ICC determination that merger terms are just and reasonable.

Unlike those cases, this case, like *Schwabacher*, involves an ICC determination concerning the reasonableness of merger terms, the existence of any surviving shareholder rights under state law, and the integrity of the capital structure of the merged railroad. On the issue of the self-executing preemption resulting from an ICC determination in these areas this Court has expressly opined in *Schwabacher*. Reviewing the legislative history of the Transportation Act of 1940 and the evolution of national transportation policy, the Court concluded that the

ICC was given "complete control of the capital structure to result from a merger." 334 U.S. at 195. Notwithstanding the willingness of the ICC and the parties to permit the parties to seek further benefits for shareholders by state court litigation, and the ICC's finding that the further payments sought by shareholders would not impair the carrier's ability to provide service, the Court held:

> If some greater amount than that specified in the agreement is to be allowed to any class of stockholders, it must either deplete the cash or inflate the liabilities or capital issues of the new company. It may be that in this case the merged company will be strong enough to carry this burden and still perform its public service. But that is not the sole purpose of the supervision provided by statute. . . . We think the Commission was in error in assuming that it did not have, or was at liberty to renounce or delegate, power finally to settle the amount of capital liabilities of the new company and the proportion or amount thereof which each class of stockholders should receive on account of its contributions to the new entity.

Id. at 198. The Court held that whatever rights appellants sought "must be founded on federal, not on state, law." *Id.*

Accordingly, said the Court:

> We therefore hold that no rights alleged to have been granted to dissenting stockholders by state law provision concerning liquidation survive the merger agreement approved by the requisite number of stockholders and approved by the Commission as just and reasonable.

Id. at 201. Thus, the ICC's determination of the fairness of merger terms is self-executing and precludes state law appraisal proceedings.

As the Chancery Court explained in its opinion below, the *City of Palestine* and *Brotherhood of Locomotive Engineers*

decisions do not implicate the *Schwabacher* holding that the required determination by the ICC as to the merger terms relating to shareholder rights and capital structure is protected by the congressional grant of exclusive and plenary jurisdiction from possible subsequent alteration in state appraisal proceedings.

In *City of Palestine* a railroad attempted to abrogate, in a merger proceeding, a contract obligating one of the merged carriers to maintain in Palestine a specified percentage of its employees in certain job classifications. Because that contract was "not germane to the success of" the approved merger, the Fifth Circuit held that its abrogation by the ICC was not immunized by the Interstate Commerce Act. 559 F.2d at 414. The "gratuitous destruction" of the contract (as the court put it) was outside the scope of the ICC's exclusive jurisdiction and the holding in *Schwabacher. Id.* at 414-15. Here, to the contrary, as the Interstate Commerce Act and *Schwabacher* make clear, a determination of the justness and reasonableness of the merger terms offered to shareholders is a necessary step in the ICC's approval and effectuation of a railroad merger.

Brotherhood of Locomotive Engineers involved disputes within labor unions concerning which local's members would operate the trains of a railroad given trackage rights by the ICC over the lines of Missouri Pacific Railroad Company in its merger with Union Pacific. The ICC ruled that its trackage right determination encompassed the "tenant" railroad's plans to use its own crews to operate its trains over the Missouri Pacific tracks. The ICC stated that its approval exempted the transactions from the requirements of all laws including any contrary provisions of the Railway Labor Act. The D.C. Circuit, by a divided panel, held that the ICC must supply a reasoned basis for the exercise of its authority to waive crew selection provisions of the Railway Labor Act. In a subsequent decision addressing the same dispute, the Eighth Circuit declined to follow the D.C. Circuit's holding. *Missouri Pacific Railroad Co. v. United Transportation Union*, 782 F.2d 107

(8th Cir. 1986) (*per curiam*), *petition for cert. filed*, 54 U.S.L.W. 3463 (U.S. Dec. 19, 1985) (No. 85-1054).

Although the Court granted certiorari to review the decision in *Locomotive Engineers*, that is not a reason to review the decision here. *Locomotive Engineers* presents a different issue and is not inconsistent with the decision below in this case, as the D.C. Circuit itself recognized in distinguishing *Schwabacher*:

> In *Schwabacher* . . . the insistence on further compensation by preferred stockholders of a merging company exceeded the compensation found just and reasonable in the ICC's approved plan of merger . . . .

Locomotive Engineers, 761 F.2d at 723 n.5. Further confirmation that *Locomotive Engineers* presents a different situation from this case is supplied by the fact that the D.C. Circuit itself has expressly held, in *Altman v. Central of Georgia Railway Co.*, 488 F.2d 1302 (D.C. Cir. 1973), discussed above, that *Schwabacher* precludes a lawsuit to enforce a shareholder's state law claim to an increased payment for his shares subsequent to ICC approval of a railroad merger.

In short, the issue here relative to the preemptive and self-executing effect of an ICC determination as to shareholder compensation and capital structure, in the absence of an express ICC invocation of an exemption from other laws, is different from the issue in the *Locomotive Engineers* and *City of Palestine* cases, those decisions are not inconsistent with the decision below here, and the pendency of certiorari in *Locomotive Engineers* provides no basis for granting certiorari in this case.

Whatever the result in *Locomotive Engineers*, the present case is governed by this Court's long-standing *Schwabacher* decision which, as shown, Congress has seen fit to leave unimpaired despite recodification of the pertinent statutory provisions. Apart from petitioners' failure to show any reason to overrule *Schwabacher*, the fact that Congress has left

Schwabacher undisturbed "lends powerful support to [its] continued viability." *See Square D Co.*, 54 U.S.L.W. at 4523. Here, as in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977), "considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

R. FRANKLIN BALOTTI
RICHARDS, LAYTON
& FINGER
One Rodney Square
P.O. Box 551
Wilmington, Delaware 19899
(302) 658-6541

LEONARD JOSEPH
(Counsel of Record)
DEWEY, BALLANTINE, BUSHBY,
PALMER & WOOD
140 Broadway
New York, New York 10005
(212) 820-1100

Counsel For Respondents

June 28, 1986

APPENDICES

APPENDIX A

49 United States Code:

§ 11344. Consolidation, merger, and acquisition of control: general procedure and conditions of approval

(a) The Interstate Commerce Commission may begin a proceeding to approve and authorize a transaction referred to in section 11343 of this title on application of the person seeking that authority. When an application is filed with the Commission, the Commission shall notify the chief executive officer of each State in which property of the carriers involved in the proposed transaction is located and shall notify those carriers. If a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title is involved in the transaction, the Commission must notify the persons specified in section 10328(b) of this title. The Commission shall hold a public hearing when a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter is involved in the transaction unless the Commission determines that a public hearing is not necessary in the public interest.

(b)(1) In a proceeding under this section which involves the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.

* * *

(c) The Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Commission may impose conditions governing the transaction. When the transaction contemplates a guaranty or assumption of payment of dividends or of fixed charges or will result in an increase of total fixed charges, the Commission may approve and authorize the transaction only if it finds that the guaranty, assumption, or increase is consistent with the public interest. When a rail carrier, or a person controlled by or affiliated with a rail carrier, is an applicant and the transaction involves a motor carrier, the Commission may approve and authorize the transaction only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition. When a rail carrier is involved in the transaction, the Commission may require inclusion of other rail carriers located in the area involved in the transaction if they apply for inclusion and the Commission finds their inclusion to be consistent with public interest.

* * *

APPENDIX B

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 30,000

UNION PACIFIC CORPORATION, PACIFIC RAIL SYSTEM, INC., AND UNION PACIFIC RAILROAD COMPANY-CONTROL-MISSOURI PACIFIC CORPORATION AND MISSOURI PACIFIC RAILROAD COMPANY

Finance Docket No. 30,000 (Sub-No. 1)

UNION PACIFIC CORPORATION, PACIFIC RAIL SYSTEM, INC., AND UNION PACIFIC RAILROAD COMPANY-CONTROL-THE WESTERN PACIFIC RAILROAD COMPANY

Decided: June 10, 1983

By decision served October 20, 1982, we approved the primary applications in these consolidated proceedings, subject to various terms and conditions. That decision has become administratively final.

Daniel A. Bruno has filed a pleading seeking reopening of the embraced Sub-No. 1 proceeding for the purpose of receiving further evidence regarding the fairness of the terms of the transaction to Western Pacific Railroad Company (WP) shareholders. Applicants have replied.

The reopening request asserts that the Commission should receive further evidence of the value of WP's land holdings as described in a prospectus dated May 2, 1983. The prospectus has been issued with respect to a shareholder meeting called for the purpose of approving the merger of WP into an indirectly wholly-owned subsidiary of Union Pacific Corporation (UP), as approved in our prior decision. UP and its subsidiaries now own about 87 percent of WP's outstanding class A common

stock, thus assuring approval of the merger and liquidation of the interests of minority shareholders. Mr. Bruno argues that statements in the prospectus regarding the proceeds from land sales since UP's tender offer for WP stock and the estimated value of WP's present land holdings are material new evidence warranting reopening of the proceeding and reconsideration of whether the transaction will be fair to the minority shareholders.

Petitions to reopen administratively final proceedings are governed by our rules of practice at 49 C.F.R. 1115.4. An administratively final proceeding will only be reopened upon a showing of material error, new evidence, or substantially changed circumstances. The allegations in Mr. Bruno's pleading are insufficient to warrant reopening of the proceeding. The land value allegations purportedly supported by the prospectus are not materially different from the allegations made by Mr. Bruno previously in his post-hearing brief. Those arguments were considered in our prior decision. Therefore, the request for reopening will be denied.

This action will not significantly affect the quality of the human environment or energy conservation.

It is ordered:

1. The request for reopening is denied.

2. This decision shall be effective on the date it is served.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Andre and Gradison.

Agatha L. Mergenovich
Secretary

[SEAL]

APPENDIX C

RICHARDS, LAYTON & FINGER
ONE RODNEY SQUARE
P.O. BOX 551

WILMINGTON, DELAWARE 19899
TELEPHONE (302) 658-6541
TELECOPIER (302) 658-6548

March 29, 1985

The Honorable Carolyn Berger
Court of Chancery
Public Building
Wilmington, DE 19801

Re: *Bruno, et al. v. Western Pacific Railroad Co., Del. Ch., C. A. No. 7250*

Dear Vice-Chancellor Berger:

We are counsel for respondent Western Pacific Railroad Company. We have been notified by counsel for petitioner Bruno that the Court has set aside the week of June 24 and, if need be, the following week for the trial of this appraisal action. We therefore feel obliged to call to Your Honor's attention our client's position with regard to the applicability of *Schwabacher v. United States*, 334 U.S. 182 (1948), to this action. This position is set forth at page 5 of the Notice of Special Meeting of Shareholders and Proxy Statement, dated May 2, 1983, a copy of which is enclosed.

In *Schwabacher*, the United States Supreme Court, in construing the predecessors to Sections 11344 and 11346 of the Interstate Commerce Act, held that appraisal rights otherwise granted by state law are preempted in the case of acquisitions approved as just and reasonable by the ICC in accordance with applicable Federal law. The Supreme Court stated: "The jurisdiction of the [ICC] . . . is made plenary and exclusive and

independent of all other state or federal authority." 334 U.S. at 197. The ICC has approved the acquisition of Western Pacific by Union Pacific involved in this appraisal action and concluded that the $20 per share price, payable under the merger agreement between the two companies, was "just and reasonable" as a matter of federal law. *Union Pacific Corp.*, 366 I.C.C. 459 at 633-36 (1982), *aff'd sub nom., Southern Pacific Transportation Co. v. I.C.C.*, 736 F.2d 708 (D.C. Cir. 1984), *cert. denied*, 53 U.S.L.W. 3597 (U.S. Feb. 19, 1985).

As stated in the Proxy Statement, Union Pacific Corporation, Western Pacific's parent, has agreed that it will not object to the prosecution of this appraisal action on the basis of *Schwabacher*, and neither Union Pacific nor Western Pacific will therefore raise any such objection, although they will argue (as contemplated by the Proxy Statement) that the determination of the ICC is entitled to substantial weight by this Court should the action go forward. The Proxy Statement also cautioned, however, that there could be no assurance that a Delaware court would not, on its own initiative, determine that *Schwabacher* denies it jurisdiction over an appraisal proceeding commenced in connection with this merger. We therefore feel obligated to bring this matter to your attention prior to the commencement of trial.

Respectfully,

/s/ R. FRANKLIN BALOTTI
R. Franklin Balotti

Enclosure

cc: Joseph A. Rosenthal, Esq.
Vernon R. Proctor, Esq.
Register in Chancery

APPENDIX D

BEFORE THE

SUPREME COURT OF THE STATE OF DELAWARE

No. 323, 1985

DANIEL A. BRUNO and PHILIP R. HERZIG,

Petitioners Below,
Appellants,

—v.—

WESTERN PACIFIC RAILROAD COMPANY, a Delaware corporation, and UNION PACIFIC CORPORATION, a foreign corporation,

Respondents Below,
Appellees.

Supreme Court Courtroom
Courthouse
Dover, Delaware
Tuesday, February 25, 1986

BEFORE:

HON. ANDREW D. CHRISTIE, Chief Justice.
HON. JOHN J. MCNEILLY, Justice.
HON. ANDREW G. T. MOORE, II, Justice.

ARGUMENT

CHANCERY COURT REPORTERS
135 Public Building
Wilmington, Delaware 19801
(302) 571-2447

APPEARANCES:

JOSEPH A. ROSENTHAL, ESQ.
MORRIS & ROSENTHAL, P.A.

and

DANIEL L. BERGER, ESQ. (New York Bar)
BERNSTEIN LITOWITZ BERGER & GROSSMANN
for Petitioners Below-Appellants.

R. FRANKLIN BALOTTI, ESQ.
RICHARDS, LAYTON & FINGER

and

LEONARD JOSEPH, ESQ. (New York Bar)
DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
for Respondents Below-Appellees.

* * *

MR. BERGER: May it please the Court, your Honors, this is an appeal from an order and judgment of the Chancery Court in which the Chancery Court dismissed reluctantly for lack of jurisdiction a statutory appraisal proceeding brought under Section 262 of 8 Delaware Code. This appraisal proceeding arose out of the merger between Western Pacific Railroad Company, a Delaware corporation, and a wholly-owned subsidiary of Union Pacific Corporation, a foreign corporation.

The Chancery Court believed that the Delaware appraisal statute was pre-empted by a federal statute, the Interstate Commerce Act, as that federal statute had been interpreted by a 1948 Supreme Court decision, Schwabacher against the United States. And, your Honors, the reluctance of the Chancery Court to dismiss the appraisal proceeding I think merits some discussion, and the reason the Court was reluctant was because of the particular circumstances in which the respondents, Union Pacific and Western Pacific, raised the issue of Schwabacher to the Chancery Court.

For over six years Western Pacific and Union Pacific had told the shareholders of Western Pacific that they would have an appraisal as far as they were concerned; that they would not object to an appraisal based upon Schwabacher; that shareholders could go into Delaware, assert their appraisal rights and Union Pacific would pay whatever value the Delaware Chancery Court decided was unfair.

JUSTICE MOORE: Didn't they also say that there was no guarantee that Schwabacher might not be applied?

MR. BERGER: That is correct, your Honor.

THE CHIEF JUSTICE: So they didn't say that, "We are going to have an appraisal." They said, "We wouldn't object to having one."

MR. BERGER: That's correct, your Honor. But what the Western Pacific shareholders assumed was that they were not going to have to face Western Pacific objecting to an appraisal, which indeed is what happened.

THE CHIEF JUSTICE: I thought that Western Pacific simply called it to the Court's attention and argued jurisdiction. They said they were not raising an objection; just assisting the Court in determining its jurisdiction.

MR. BERGER: Well, your Honor, I think that the Chancery Court's statements on those scores are germane to that. The Chancery Court said it would have proceeded with a trial of the appraisal proceeding but for the fact that Western Pacific and Union Pacific raised the issue. Indeed, the appraisal proceeding had been filed in July of 1983, right after the merger. The appraisal proceeding had gone on for almost two years without the respondents saying anything.

THE CHIEF JUSTICE: Are you suggesting there's little difference between objecting and raising a question as to jurisdiction?

MR. BERGER: I think in this case, your Honor, there is little difference, given what Western Pacific told shareholders and

the fact that they strenuously argued to the Chancery Court that the appraisal should be dismissed, contrary to what they had previously told Western Pacific shareholders, which was, "We are not going to object to the Chancery Court determining fair value."

JUSTICE MCNEILLY: But could jurisdiction be given if precedent said there was not jurisdiction in the Court?

MR. BERGER: No, your Honor, and we do not maintain that we can confer jurisdiction by agreement or that there is jurisdiction by estoppel. What we maintain is that the Interstate Commerce Act, the federal Act in question, does not pre-empt the Delaware appraisal statute and that the Chancery Court was incorrect in its decision.

THE CHIEF JUSTICE: So then you come right up against the case that you mentioned—

MR. BERGER: That is correct, your Honor.

* * *

APPENDIX E

Set forth below, pursuant to Rule 28.1, is a list of all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of respondents The Western Pacific Railroad Company and Union Pacific Corporation:

Alameda Belt Line

Alton & Southern Railway Company

Arkansas & Memphis Railway Bridge and Terminal Company

Brownsville and Matamoros Bridge Company

Camas Prairie Railroad Company

Central California Traction Company

Champlin Marketing, Inc.

Chicago and Western Indiana Railroad Company

Denver Union Terminal Railway Company

Galveston, Houston and Henderson Railway Company

Great Southwest Railroad, Inc.

Houston Belt & Terminal Railway Company

Jefferson Southwestern Railroad Company

Kansas City Terminal Railway Company

Longview Switching Company

Oakland Terminal Railway

Portland Terminal Railroad Company

Portland Traction Company

Southern Illinois and Missouri Bridge Company

St. Joseph Terminal Railroad Company

Terminal Industrial Land Company

Terminal Railroad Association of St. Louis

Texas City Terminal Railway Company

The Belt Railway Company of Chicago
The Ogden Union Railway and Depot Company
The Pueblo Union Depot and Railway Company
Trailer Train Company
Union Pacific Resources Ltd.
Unita Development Company

Supreme Court, U.S.
FILED
APR 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-1957

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DANIEL A. BRUNO and PHILIP R. HERZIG,

Petitioners,

—against—

WESTERN PACIFIC RAILROAD COMPANY and UNION PACIFIC CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION

R. FRANKLIN BALOTTI
RICHARDS, LAYTON & FINGER
One Rodney Square
P.O. Box 551
Wilmington, Delaware 19899
(302) 658-6541

LEONARD JOSEPH
(Counsel of Record)
DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
140 Broadway
New York, New York 10005
(212) 820-1100

Counsel For Respondents

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1957

DANIEL A. BRUNO and PHILIP R. HERZIG,

Petitioners,

—against—

WESTERN PACIFIC RAILROAD COMPANY
and UNION PACIFIC CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF DELAWARE

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION

Respondents The Western Pacific Railroad Company ("Western Pacific") and Union Pacific Corporation ("Union Pacific") submit this supplemental brief pursuant to Rule 22.6 to inform the Court of a development which may conceivably affect the Court's decision on the petition for a writ of certiorari in this matter. See *Tiverton Bd. of License Comm'rs v. Pastore*, 469 U.S. 238, 240 (1985); *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring).

1. Reason For A Supplemental Brief.

The petition for a writ of certiorari in this matter was filed on behalf of former Western Pacific shareholders who elected not to accept the $20 per share tender offer and merger price offered to all Western Pacific shareholders by Union Pacific and approved by the Interstate Commerce Commission as "fair and reasonable." Instead, Petitioners and those they represent sought appraisal rights pursuant to the Delaware appraisal statute, Del. Code Ann. tit. 8, § 262. They petition for a writ of certiorari from the Delaware Supreme Court's decision, based on *Schwabacher v. United States*, 334 U.S. 182 (1948), and 49 U.S.C. § 11341(a), that the ICC's approval of the $20 per share price necessarily preempted state law appraisal rights and precluded jurisdiction over the appraisal proceeding.

Following submission of Respondents' Brief In Opposition to the petition for a writ of certiorari herein, a Western Pacific Stockholders' Protective Committee ("SPC"), composed of former Western Pacific stockholders who did not tender their shares to Union Pacific but instead sought Delaware appraisal rights, filed with the ICC a Petition to Reopen for Entry of Supplemental Order pursuant to 49 U.S.C. § 11351. That petition asked the ICC to reopen the proceeding in which it had approved Union Pacific's merger with Western Pacific, as well as Union Pacific's offer of $20 per share—the very same proceeding that had formed the basis for the Delaware Supreme Court's determination of lack of state law appraisal proceeding jurisdiction—and to redetermine the fair value of Western Pacific at the time of its merger into a subsidiary of Union Pacific in May, 1983.

In support of the petition to reopen, SPC made three arguments to the ICC that are identical to arguments made in

support of the petition for a writ of certiorari in this action.[1] In a decision, dated January 28, 1987, the ICC denied the petition to reopen and responded to these arguments. *Union Pacific Corp., Pacific Rail Sys., Inc., and Union Pacific R.R. Co.-Control-The Western Pacific R.R. Co.*, Finance Docket No. 30,000 (Sub.No. 1) (I.C.C. Jan. 28, 1987). The ICC's response reaffirms the fairness of the $20 per share merger price, demonstrates the accuracy of the statements made in Respondents' Brief In Opposition herein and further supports the conclusion that the petition for a writ of certiorari in this matter should be denied.

2. The ICC Decision On The Petition To Reopen.

Thus, the petition for a writ of certiorari herein seeks to overturn the Delaware Supreme Court's denial of appraisal rights by accusing Union Pacific and Western Pacific of making misrepresentations to the Western Pacific shareholders, the ICC, and the United States Court of Appeals for the District of Columbia Circuit concerning the availability of Delaware appraisal rights to dissenting Western Pacific shareholders. Pet. at 3, 25-27. In response to the same argument in SPC's petition to reopen, the ICC stated:

> "We reject Petitioners' contention that they are entitled to an appraisal by the Commission merely because UPC 'promised' them an appraisal and the Delaware courts found that they lacked jurisdiction to conduct one. While UPC stated that it would pay the appraised price if an appraisal were conducted (Tender offer, page 9), UPC and WP also indicated quite clearly, in both the tender offer and proxy statement, that the existence of a State court appraisal remedy was in some doubt. We do not think stockholders were or should have been misled by these

---

1 As an initial matter, the arguments made in support of the petition for a writ of certiorari are not pertinent to the issue of federal preemption of state law appraisal jurisdiction presented by the petition. In any event, as demonstrated herein and in Respondents' Brief In Opposition, the arguments have no merit as a factual or legal matter.

> statements. If they could read about and understand the possibility of an appraisal, they could also see the questions about its availability. Nor do we think UPC was obligated to accede to a State court appraisal proceeding, which, if concluded, would have been a nullity . . . ."

ICC Decision at 3.

The petition for a writ of certiorari herein also relies for support on the assertion that the ICC's approval of the Union Pacific-Western Pacific merger and the $20 per share price to Western Pacific stockholders was premised on the ICC's belief that Delaware appraisal rights would be available to dissenting Western Pacific shareholders. Pet. at 6, 21, 24. The ICC, in denying SPC's petition to reopen, expressly stated that neither it "nor the Court of Appeals relied upon the possibility of an appraisal as the basis for, or even an element in, their approval of the terms of the transaction." ICC Decision at 3. The ICC went on to state:

> "Contrary to SPC's contention, we did not leave the determination of the amount to be received by any WP shareholder (assenting or not) to the Delaware courts, but determined 'the full economic equivalent of what they [all WP shareholders] presently hold.' *Schwabacher*, 334 U.S. at 199. *Schwabacher* has been satisfied; the issue is *res judicata*."

ICC Decision at 3-4 (footnote omitted). In an accompanying footnote, the ICC once again affirmed ". . . we did not rely on the existence of appraisal rights in our decision. . . ." *Id.* at 4 n.6.

Thus, as discussed in full in Respondents' Brief In Opposition, and contrary to the claims made in support of the petition for a writ of certiorari, the ICC, in approving the Union Pacific-Western Pacific merger and the $20 per share offered to Western Pacific shareholders, expressly recognized its obligation under *Schwabacher v. United States*, 334 U.S. 182 (1948), to determine the fair value of Western Pacific stock and fulfilled that obligation without any anticipation of or mis-

understanding about the availability of a Delaware appraisal proceeding.

Finally the petition for a writ of certiorari claims that when the ICC approved the Union Pacific-Western Pacific merger and the $20 per share price offered to Western Pacific shareholders it was ignorant of the alleged value of certain Western Pacific landholdings. Pet. at 11-12. In response to the same claim by SPC in the petition to reopen, the ICC first noted its skepticism concerning the alleged hidden value of Western Pacific's landholdings:

> "SPC does not claim that anything occurred between January 1980 (when the $20 price was agreed upon) and 1983 to increase the value of the land, but that 'no one was aware of the value of WP's hidden assets' (WP's landholdings) until the 1983 Proxy Statement. We question the likelihood of this universal unfamiliarity with WP's assets, particularly on the part of the financial community, the WP Board of Directors (which accepted the UP offer of $20 per share after receiving the advice of an independent investment banking firm, Solomon Brothers) and Mr. Wheeler, who served as counsel to WP during 1978-79 Commission consideration of the sale of WP's assets (see n.5, *supra*)."

ICC Decision at 4 n.7. The ICC then went on to note the irrelevancy of the claim in any event because it had been made aware of the purported hidden land values in a previous petition to reopen and reconsider filed by Daniel A. Bruno, one of the petitioners seeking a writ of certiorari herein:

> ". . . we do not agree that this is the first time the Commission has been asked to value the compensation based on the so-called new evidence. In our June 16, 1983, decision referred to earlier, we declined to reopen and reconsider our valuation finding, as requested by a minority stockholder [Daniel A. Bruno] based on new evidence of land values found in the proxy statement. We stated in that decision, at page 2, that the land value allegations were similar to those made on the record and

> considered in our decision approving merger. We rely on that decision here, and note that the other evidence relied on by SPC is not enough, standing alone, to warrant reopening. This is bolstered by the fact that our conclusion as to fairness was based on the going concern value of WP, not liquidation value, which might give greater weight to the value of particular assets."

Id. at 4.

Moreover, in using "going concern value of WP" as a fairness standard, the ICC was using the same standard a Delaware appraisal court would have applied. *See, e.g., Tri-Continental Corp. v. Battye*, 74 A.2d 71, 72 (Del. Supr. 1950) ("The basic concept of value under the appraisal statute is that the stockholder is entitled to be paid for that which has been taken from him, *viz.*, his proportionate interest in a going concern."); *Weinberger v. UOP, Inc.*, 457 A.2d 701, 713 (Del. Supr. 1983). Thus, a Delaware appraisal proceeding would not only have been a "nullity," see ICC Decision at 3, it would be redundant.

CONCLUSION

As discussed in Respondents' Brief In Opposition, the petition for a writ of certiorari in this matter rests on erroneous claims concerning what the ICC did and knew in approving the Union Pacific-Western Pacific merger and the $20 per share price offered to Western Pacific shareholders as "fair and reasonable." As discussed above, the ICC's decision denying SPC's petition to reopen provides a response to these claims and effectively demonstrates that they are simply unfounded. For the reasons set forth above and in Respondents' Brief In Opposition, the petition for a writ of certiorari herein should be denied.

R. FRANKLIN BALOTTI
RICHARDS, LAYTON
& FINGER
One Rodney Square
P.O. Box 551
Wilmington, Delaware 19899
(302) 658-6541

LEONARD JOSEPH
(Counsel of Record)
DEWEY, BALLANTINE,
BUSHBY, PALMER & WOOD
140 Broadway
New York, New York 10005
(212) 820-1100

Counsel For Respondents

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